I.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

AELE believes that one of the most effective means of accomplishing these purposes is through the filing of briefs, *amicus curiae*, in cases of crucial significance with regard to the enforcement of the criminal law. In its *amicus* advocacy AELE seeks to represent the concern of the average citizen with the problems of crime and lawlessness in this country and to represent the desire of the vast majority of our citizens for effective law enforcement, commensurate with the protection of the rights of individuals. We further seek to articulate to the courts the very real practical problems which confront law enforcement officers in order that the courts may weigh such problems in deciding cases which will have a vital impact on the effectiveness of the law enforcement process as a whole.

As the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice has pointed out:

> . . . many . . . decisions are made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. *If judges are to balance accurately law enforcement needs and human rights, the former must be articulated.* They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire Nation. (Page 94.) (Emphasis added.)

The articulation called for by the President's Commission is what AELE seeks to accomplish.

The International Association of Chiefs of Police, Inc., is a not-for-profit professional association, and represents over 7,000 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and in 57 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

The IACP Legal Officers' Section is the only nationally organized body of police legal advisors. They serve as house counsel to 188 law enforcement agencies representing nearly 200,000 police officers and sheriff's deputies in the United States. Most of them are active and participating members of the Section: on April 13, 1973, the Section resolved to adopt the position of the United States in the instant case, and to join this brief in support thereof.

The Metropolitan Police Department of the District of Columbia is the agency principally charged with enforcing the laws of the District of Columbia. The United States Court of Appeals

for the District of Columbia Circuit has jurisdiction over the District of Columbia, therefore its decisions directly affect the Metropolitan Police Department of the District of Columbia. The Metropolitan Police Department of the District of Columbia and its approximately 5000 officers patrol an urban environment of 764,000 residents. Its interests are being represented herein, through its General Council who serves as Legal Advisor to the Department.

II.

OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

This case raises the very important issue of the permissible scope of a search incident to a lawful custodial traffic arrest. Additionally, the case raises the issues of: (1) the scope of a search which a police officer may lawfully make for his own protection and the protection of others, and (2) of the scope of the Exclusionary Rule in cases such as the instant case. *Amici* will confine our argument to the latter two issues.

The safety of police officers on the street is obviously a matter of the most vital concern to the law enforcement agencies and officers and to those organizations which have a legitimate concern with the effectiveness of law enforcement. *Amici* believe that the decision below, if allowed to stand, will have a direct and deleterious impact upon the ability of police officers to protect themselves in the dangerous situation of a traffic arrest.

Likewise, the Exclusionary Rule, which affects the activities of every law enforcement officer in the United States, is of major concern to those with an interest in the effectiveness of law enforcement. This case presents an opportunity for this Court to examine and to consider narrowing the scope of the Exclusionary Rule, as a matter of the most immediate concern to law enforcement nationwide, and to the law-abiding citizens

who depend upon law enforcement for protection from criminal activity.

Amici therefore respectfully move this court for leave to file this brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-936.

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIE ROBINSON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.; AND THE METROPOLITAN POLICE DEPARTMENT OF THE DISTRICT OF COLUMBIA.

INTEREST OF THE AMICI CURIAE.

Our interest has been set forth above at page 2 in our motion to file this brief as *amici curiae*.

SUMMARY OF ARGUMENT.

Amici support the legal arguments made by the petitioner that the search in this case was proper and should be sustained; however, we will not reiterate these arguments herein. *Amici* will confine their arguments to the two issues in this case involving: (1) the safety of the police officer in custodial traffic arrest situations; and, (2) possible modification of the Exclusionary Rule, limiting its applicability to those cases of police misconduct which are wilful and substantial.

The lower court was faced with the question of the extent to which a protective search could be made by police officers making a custodial traffic arrest. The lower court, in a 5-4 plurality opinion, limited the protective search to a *Terry*-type frisk. *Amici* present herein statistical data, in the form of numbers of police officers killed and injured in custodial and traffice arrest situations in recent years, to prove that such situations are indeed highly dangerous police activities.

Amici reject the idea, put forth by the court below, that traffic arrest situations are perhaps the "safest" of police activities.

The lower court rejected the total protection which would be afforded to police officers by a full field search in favor of "substantial" protection which would be afforded by a frisk. *Amici* argue emphatically against the idea of "balancing" the safety of police officers against the minimal invasion of privacy involved in the instant case: the full search of one already in custody for a traffic offense. Our reasoning for this position is based upon our view that the death or injury of a police officer is a matter of major importance in our criminal justice system, not to be lightly cast aside; and that judges sitting in the remote isolation of the courtroom should not impose abstrationist and artificial standards in cases involving the safety of police officers who encounter their dangers at first hand.

Finally, *amici*, in this brief, offer this court concrete examples of actual cases, taken from police files across the nation, in which highly dangerous criminals have managed to conceal on their persons firearms which cursory searches failed to discover. In offering these cases we are attempting to bridge the gap between the realities of police work "on the street" and the necessarily isolated remoteness of the courtroom. Our argument on this issue concludes by urging this Court to reverse the lower court, to affirm the right of the police to make full field searches in custodial traffic arrest situations, and to mandate lower courts to apply realistic standards of judgment to cases in which the safety of police officers is clearly involved.

In the second section of our argument, we argue that the time has come to follow the suggestion made by Mr. Chief Justice Burger in his dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), that the Exclusionary Rule be done away with or modified. We urge this course of action because of the mounting evidence that the Exclusionary Rule simply does not effectively deter police misconduct and that it places an extremely heavy burden upon society by requiring the release of patently guilty criminals.

The facts of the instant case clearly indicate that the "violation" of respondent's Fourth Amendment rights in the instant case—if a violation there be—was: (1) non-wilful, and (2) insubstantial. Further, the absolute application of the Exclusionary Rule to the search made here will not deter future police conduct in cases in which the safety of the officer is involved; and the current confusion surrounding the law of search and seizure makes it unlikely that an Exclusionary Rule which cannot be understood by police officers can, as a practical matter, be enforced.

For these reasons we urge the Court to consider a modification of the Exclusionary Rule limiting its application to wilful, flagrant, and substantial violations of individual rights through police misconduct.

ARGUMENT.

Amici, in this brief will not reiterate the legal arguments advanced by the United States that the search in the instant case should be sustained, although we are in complete agreement with the position of the United States on this issue and we wish to associate ourself with it. *Amici*, rather, will deal with the two issues in this case which are of critical importance insofar as the effectiveness of law enforcement is concerned: (1) the safety of police officers, and (2) the application of the Exclusionary Rule in the instant case.

I.

The Proven Dangers of Custodial Traffic Arrest Situations Mandate That Courts Should Review Such Cases Realistically So as to Afford the Maximum Protection Possible to Law Enforcement Officers.

A. Custodial Traffic Arrests Present a Clear Danger to Law Enforcement Officers.

The lower court plurality in this case was confronted squarely with the issue of the right of a police officer to make a thorough search, for his own protection, of a traffic offender whom he had, as required by his departmental regulations,[1] taken into custody. That court resolved the issue against the safety of the police officer. It held, in a 5-4 plurality opinion, that a *Terry*-type frisk was the only permissible protective search that an officer could make, pursuant to a custodial traffic arrest, and further held, as a consequence, that a packet of heroin found during a good faith, full field search of the traffic offender was the fruit of a Fourth Amendment violation and therefore inadmissible in evidence.

1. D. C. Metropolitan Police Department General Order No. 3, Series 1959 (April 24, 1959).

We believe that, if it is sustained, this limitation upon the scope of a protective search in cases such as this will, in all likelihood, materially increase the dangers faced by police officers. Accordingly, we urge this Court to reverse the holding of the lower court and further to hold that appellate courts, when reviewing police procedures in which the safety of law enforcement officers is a major factor, should apply realistic standards of judgment, taking into account the actual dangers with which our law enforcement officers are daily faced.

This Court has traditionally been solicitous of the safety of law enforcement officers in their confrontations with the lawless and violent elements of society as is evidenced by its holdings in *Terry* v. *Ohio*, 392 U. S. 1 (1968) and, more recently, in *Adams* v. *Williams*, 407 U. S. 143 (1972), two cases involving stop and frisk procedures in police-suspect confrontations. We contend, as does the government, that the instant case, in which the inherent dangers of a traffic arrest are combined with a situation involving the actual taking into physical custody of the arrestee, justifies the full field search condemned by the court below. We seek, herein, to present this Court with empirical data to support this contention.

Traffic stops are one of the most dangerous aspects of police work. In most such instances an officer is approaching a stopped vehicle with no idea as to whether or not he is going to confront a law abiding citizen who has inadvertently exceeded the speed limit or passed a stop sign, or a dangerous criminal fleeing from, or wanted for, another crime of which the officer making the traffic stop has no knowledge. This lack of knowledge makes the officer extremely vulnerable to a surprise attack from those criminals in the latter category who know very well that they are wanted for other crimes.

This vulnerability on the part of a police officer making a traffic stop can be graphically illustrated by two recent cases:

(1) On October 12, 1972 Michigan State Trooper Steven DeVries stopped a car, apparently for a traffic

violation. The car had been stolen and used to escape from a bank robbery of which Trooper DeVries was unaware because no alert had been sounded. The driver of the car, who had earlier robbed the bank, shot Trooper DeVries to death. The license number of the robber's car was found on the trooper's clip-board. (*Chicago Tribune*, October 13, 1972, p. 5.)

(2) On May 3, 1973, a New Jersey State Policeman was killed by the occupants of a car that he had stopped for a routine traffic check. The occupants were militants, wanted in another state for killing policemen. (*New York Times*, May 3, 1973, p. 1.)

Both of these cases are typical examples of the dangers inherent in traffic stops: the officer is caught unawares by the show of deadly force by the "traffic offender" and the fact that the element of surprise is totally with the "traffic offender" materially increases the danger to the officer.

The dangerous nature of the "routine" traffic stop is amply illustrated by the tragic statistics of officers killed in traffic arrest situations. During the five year period 1968-1972, according to the Uniform Crime Reports of the Federal Bureau of Investigation, law enforcement officers nationwide were murdered in traffic stops as follows:

	Total Murdered	Murdered in Traffic Stops
1968	64	1
1969	86	5
1970	100	9
1971	126	20
1972	112	14

Even more ominous are the figures for the three month period January through March of 1973. In this period 35 officers were murdered, 11 of them in traffic stops, for a ratio of *almost one in three* traffic stop deaths to total deaths.[2] Thus, there can

2. Uniform Crime Reports of the Federal Bureau of Investigation, January through March, 1973.

be no question that law enforcement activity dealing with traffic stops is a truly dangerous activity.[3]

Compounding the danger of situations such as are involved in the instant case is the fact that the officer was required to take the traffic arrestee into custody. This means that for a more or less prolonged period of time the arresting officer will be exposed to the close proximity of the arrestee as well may be other officers, custodial personnel, and other prisoners. The danger to all of these individuals is not imaginary. In the period January, 1968 through March, 1973, 25 law enforcement officers have been killed in the United States while handling, transporting or engaged in the custody of prisoners.[4] Thus, we see in the combination of the traffic stop and the custodial situation the very real dangers faced by law enforcement officers in cases such as the instant one.

Against the background of this information, which establishes beyond doubt the actual danger of custodial traffic arrests, the attitude of the plurality of the lower court towards the safety of police officers warrants examination. The majority comes to the almost unbelievable conclusion that the possibility of injury to a police officer is "remote"[5] and that ". . . [traffic] arrests constitute possibly the safest of all law enforcement activities."[6] We are, frankly, at a loss to understand how an activity, which has claimed the lives of sixty officers in a five year and three month period, can even be called "safe," much less the "safest."

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3. The statistics given above for traffic stops and handling of prisoners deal with homicide only. Statistics on assaults against law enforcement officers in these categories are less readily available; however, Judge Wilkey notes in his dissenting opinion to the plurality opinion below that in the period July, 1970 to June, 1971, 100 police officers sustained injuries in the course of making traffic arrests. 471 F. 2d 1082 (1972) p. 1616 ft. 20.

4. Uniform Crime Reports of the Federal Bureau of Investigation, January 1968 through March, 1973.

5. 471 F. 2d 1082, p. 1097.

6. *Id.* p. 1097.

The plurality below bases its conclusion as to the "safety" of traffic arrests upon the proportionate number of such arrests to the number of officers killed or injured. While the proportion is admittedly small, we submit that this sort of analysis begs the question. Our society has, as its sole defense against lawlessness and violence, the police officer on the street. We require him, by the oath he has taken, to interpose himself between us and the criminal, to confront those engaged in criminal acts and to seek out those who have committed or are about to commit criminal acts. In these circumstances the wanton killing or injuring of *any* law enforcement officer is of major concern to society and when as clear a pattern of danger is established as in the traffic stop situation this danger should not be treated with the insensitivity, based on statistical ratios, which was shown by the plurality below.

The analysis of the lower court plurality that danger to the police officer becomes remote because of the number of *non*-fatal or *non*-injurious contacts made, would, if taken to its logical conclusion, dictate that reviewing courts not concern themselves with the safety of law enforcement officers at all; for obviously the number of enforcement activities in which the officer is engaged on a daily basis will far exceed the number in which he is killed or injured. We emphasize again, however, that this is simply not the point. Once a clear pattern of danger to police officers has been shown we submit that this danger should be a matter of vital concern to reviewing courts and should not be cast aside lightly on the basis that the potential danger only becomes *actual* in a relatively small number of cases, proportionately speaking.

The plurality below, after convincing itself of the remoteness of danger in traffic stop situations, engages in a "balancing" test in which the right of a person who has been arrested and taken into custody for a traffic offense not to be thoroughly searched are weighed against that of the officer to search for his own

protection.[7] We submit that when the danger to police officers is as clear and present as it is in the custodial traffic stop situation and when the invasion of privacy is as minimal as in the case of searching someone *who has already been taken into full custody*, then such a "balancing" test is completely inappropriate. We do not believe that the Fourth Amendment requires such nice distinctions and "balancing" tests between the very real, empirically proven, risks which police officers face in custodial traffic stop situations and the right of privacy of citizens, unless the right involved is so compelling and overwhelming as to mandate a disregard for the officers' safety. There may be such cases, but the instant case is clearly not one of them, for, in the instant case, the expectation of one lawfully arrested not to be fully searched is hardly reasonable and is not sufficiently compelling to offset in any manner the dangers to the officers involved.

The plurality opinion below, as a part of its balancing test concedes that ". . . a thoroughgoing search . . . would offer *total* protection to the officer . . .",[8] but refuses to sanction such a search and, instead, leaves the officer to the "substantial" protection of a *Terry*-type frisk.[9] We do not believe that, in those areas in which a clear danger has been established, this court or any other court should relegate the safety of police officers to that of mere "substantiality." For the policeman on the street who is called upon actually to make the confrontation in a traffic stop (and who is well aware of the statistics of traffic stop fatalities) the picture is far different than it may be to a judge sitting in the isolated safety of a courtroom. The policeman should not have to content himself in the knowledge that a judge has decided that he is 7/10 or 8/10 or 9/10 safe from being killed or injured by one whom he has arrested and taken into custody.

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7. *Id.* p. 1101.
8. *Id.* p. 1100.
9. *Id.* p. 1099.

We do not argue herein that there should be no limitation upon the right of the police to protect themselves through searches for weapons. We would not, for example, ask this Court to sanction random weapons searches based neither upon probable cause or reasonable suspicion. Nor would we ask this Court to sanction, by the admission of evidence seized, the legality of a search incident to traffic arrest which was a mere subterfuge to search for other evidence, but this is clearly not the situation in the instant case. What we do urge is that, at least in cases such as these, where the intrusion is minimal and the countervailing danger real, this court will not limit, and will not permit lower courts to limit, the legal right of law enforcement officers to make searches which are sufficiently thorough to protect them.

B. A Terry-type Frisk Provides Insufficient Protection to Law Enforcement Officers.

We have mentioned herein the difference between the actualities of law enforcement activity which face the policemen on the street on a day to day basis and the unreal and remote view of this same activity which is often taken by an appellate jurist whose exposure to the dangers involved is purely vicarious. The plurality opinion below which talks of the "substantial" protection of police officers embodied in the permitted "frisk" is an excellent example of just such an unreal and abstractionist view of the realities of police work. In this section of our Argument we wish to offer to the Court a number of actual police cases in which a cursory search or "frisk" for weapons, as would be permitted by the plurality, failed to disclose deadly weapons which a thorough search would almost undoubtedly have revealed. Although three of these cases involved crimes other than traffic offenses we are utilizing them to demonstrate to the Court the fact that weapons may often be concealed in such a manner that a frisk will not locate them.

1) On May 16, 1970 Santa Clara County, California, Sheriff's officers had occasion to arrest a suspect on an outstanding warrant for default of bail. A .22 caliber revolver was found in the suspect's boot during a thorough search; however, two prior pat-downs of the boot had failed to reveal the weapon. Source: Mr. Royce Fincher, Police Legal Advisor, San Jose, California Police Department.

2) On August 31, 1968 officers of the Greenfield, California police department stopped a car for speeding and after determining that the car was stolen, arrested the driver, an A. W. O. L. paratrooper. While being booked at the police station the suspect pulled a gun, which had been concealed in the athletic supporter of a bathing suit which he had on under his trousers, and kidnapped a policeman. The officer subsequently escaped and the suspect later surrendered. After his surrender the suspect was able to conceal from the officers yet another pistol in the athletic supporter which he drew and shot himself. Source: *Greenfield California News,* September 4, 1968.

3) On June 25, 1972 a motorist was stopped by Santa Clara California police officers for defective brakes. A name check revealed that there was an outstanding traffic warrant for the motorist. He was taken to jail to post bond on the warrant. Under California law, *People* v. *Superior Court* (Simon), 7 Cal. 3d 186 (1972), only a "frisk" was permissible. The frisk turned up a knife in the suspect's back pocket, but as the officer indicated in his report of the incident: ". . . no exploratory or probing search was further made." It was determined that the suspect was unable to post bail and he was finally booked into the jail. Only then was a .25 caliber automatic found concealed in his crotch. The suspect turned out to be a convicted robber; three months later the same suspect shot and killed a Sunnydale California police officer. Source: Santa Clara California Police Department Offense Report.

4) On April 11, 1971, at about 1:00 a.m. a Washington State Trooper arrested a man for drunken driving. He frisked the arrestee's outer clothing, finding no weapons. While the trooper was transporting the suspect to jail the suspect pulled a pistol from a tightly fitting shoulder

holster which he had concealed in his armpit under a very heavy coat and vest. The suspect took the trooper and a dispatcher hostage, but was finally subdued and apprehended. Source: Washington State Patrol Offense Report.

5) On June 5, 1954, Daytona Beach Police picked up a sixteen year old boy for being a runaway. They frisked the boy but found no weapons. As the boy was being processed into juvenile hall, he produced a gun which had been concealed in a belt worn under his dungarees and shot and killed a juvenile custodial officer. The officer who had originally arrested the runaway stated in his report that he did not see or feel anything while frisking the boy. Source: Daytona Beach, Florida Police Department Offense Reports.

6) On February 13, 1973, in the early morning hours, a Seattle, Washington police officer observed a car standing in the middle of an intersection. The officer approached the car, which appeared to be abandoned, when an individual in the car sat up behind the steering wheel. After questioning the suspect, the officer, believing the car to have been stolen, placed the suspect under arrest. After this arrest the officer frisked the suspect who became combatative during the frisk. The officer then handcuffed the suspect's hands behind his back. Upon receiving confirmation that the car was, in fact, stolen, the officer placed the suspect in the back of his police car to take him to the station. The suspect pulled a gun, apparently hidden under his belt in back and shot at the officer six times until he was finally subdued. Source: Seattle, Washington Police Department Offense Report, February 13, 1973.

7) In Charlotte, North Carolina on June 17, 1971, an individual who had been arrested for stealing a car and had been handcuffed behind his back was able to pull a pistol from his clothing and wound a police officer. The suspect had been frisked but not searched. Source: Office of the Legal Advisor, Charlotte, North Carolina Police Department.

In each of the foregoing cases, weapons, all firearms, which were well concealed inside the suspects' clothing, were not discovered by frisks or cursory searches. We have brought these cases to the Court's attention in order to try to bridge the gap between the theoretical "substantiality" of the safety of officers contained in the lower court opinion and the reality of police work in dealing with dangerous individuals who have gone to considerable pains to conceal their weapons. In each of the cases the arrest was fully custodial and in three of the cases custodial traffic arrests were involved. These cases are, we submit, typical of many in which the "substantial" protection of police officers with which the plurality opinion below credits a frisk or pat-down is, in reality, no protection at all.

Additionally, the last two instances cited above, are cases in which frisks did not discover weapons, which were subsequently pulled by suspects whose hands had been handcuffed behind their backs. These two cases illustrate the fact that criminals, who have been taken into custody and theoretically rendered harmless through the handcuffing process, may nevertheless be extremely dangerous. Again, we emphasize the difference between theory and reality. To one unfamiliar with police work as it actually is, a criminal suspect whose hands have been handcuffed behind his back would seem to be the epitome of helplessness; yet the realities of the situation, illustrated by these two cases, indicate precisely the opposite.

In each of the cases set forth above a thorough search would have revealed the weapon. The plurality opinion below would deny to officers the "total" protection which a thorough search in custodial traffic arrests would provide. We urge this Court to reverse the decision below and to reaffirm the right of law enforcement officers to the maximum legal protection which they can be accorded as they go about their activities in one of the more dangerous areas of their service.

II.

The Exclusionary Rule Should Be Modified to the Extent That Non-Wilful, Insubstantial Violations, Such as Are Involved in This Case, Should Not Be Encompassed by the Rule.

The instant case presents a vehicle by which this Court is again given an opportunity to examine the continued validity and scope of the Exclusionary Rule. This Rule, made a part of our jurisprudence in 1914 for federal proceedings[10] and in 1961 for state proceedings,[11] seeks to deter unlawful police conduct through the suppression of illegally obtained evidence. Of late, the Rule has come in for considerable cirticism, the most telling of which was in the form of a dissenting opinion by Mr. Chief Justice Burger in *Bivens* v. *Six Unknown Named Federal Narcotic Agents*, 403 U. S. 388 (1971).

In this opinion the Chief Justice reviewed the major arguments against the Exclusionary Rule and concluded that the Rule does not accomplish its often-stated purpose of deterring illegal police conduct, does not provide a remedy for those parties aggrieved by illegal searches and seizures against whom criminal proceedings have *not* been brought, and does nothing to punish the wrongdoing police officers.[12] Additionally, he noted, the Rule places a tremendous burden upon society by requiring the freeing of offenders whose factual guilt is patent.

The Chief Justice suggested that a legislative alternative to the Exclusionary Rule be set up whereby the governmental entity for which the errant police officer worked be held liable to the aggrieved party for the officer's illegal acts and that all relevant

10. *Weeks* v. *United States*, 232 U. S. 383 (1914).

11. *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

12. Additional evidence to this effect may be found in recent law review articles. See: Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives. J. Legal Studies, University of Chicago Law School, January 1973, p. 243; and Tonkin, A Need To Modify the Exclusionary Rule, 1973 Virgin Islands Bar Journal, Vol. 4, No. 1, p. 1.

and probative evidence be admissible no matter how it was obtained. Chief Justice Burger then stated that he could not countenance doing away with the Exclusionary Rule *entirely* until proper legislative alternatives were set up to restrain and punish unlawful police conduct; nevertheless he added:

> Independent of the alternative embraced in this dissenting opinion, I believe the time has come to reexamine the *scope* of the Exclusionary Rule and *consider some narrowing of its thrust* so as to eliminate the anomalies it has produced. 403 U. S., at 424. (emphasis supplied.)

Amici herein will not dwell at length upon the arguments which have been raised against the Exclusionary Rule, as these have been raised before this Court in other cases.[13] We believe however, that this case presents an excellent opportunity for this Court to consider narrowing the scope of the Rule as it is applied to the instant case. We believe that, even if this Court should find that the search of Respondent violated the Fourth Amendment, the Exclusionary Rule, for the following reasons, should not be applied to the facts of this case.

1) *This was not a flagrant or wilful violation.* The search of the respondent was made pursuant to a lawful arrest for operating a motor vehicle after revocation of the operator's permit. There is nothing in the record to show that the police officer was acting in bad faith and the United States District Court for the District of Columbia, upon remand from the first *en banc* hearing, specifically found that the search of respondent was proper.[14] Indeed the "full field" search of the respondent was mandated by the Officer's departmental regulations.

The fact that the *en banc* Court of Appeals below split 5 to 4 over the legality of the search is further evidence that the violation was non-wilful. A Fourth Amendment "violation"

13. See e. g. the brief of the State of California and briefs *amicus curiae* (including *amici* herein), in support thereof, in the case of *California* v. *Krivda*, 409 U. S. 33 (1972).

14. See Appendix B to the Petition of the United States for certiorari in the instant case.

by a police officer, which four distinguished federal appellate judges found to be no violation at all, can hardly be classified as "wilful" on the part of the police officer.

Chief Justice Burger in his dissent in *Bivens* noted that there can clearly be two types of "violation" in Exclusionary Rule cases:

> Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressures of police work. These honest mistakes have been treated in the same way as deliberate *Irvine*-type violations of . . . the Fourth Amendment. *Bivens, supra,* at 418.

Amici believe that the "violation" herein is precisely that type of "honest mistake" to which the Chief Justice had reference, and that the Exclusionary Rule should be modified so as to encompass only those flagrant, *Irvine*-type violations in which policemen willfully violate, in a substantial manner, another's rights.

2) *The "violation" in the instant case was not substantial.* In this case the respondent was already in custody pursuant to a lawful arrest, and pursuant to this arrest his freedom was completely restricted. If he could not make bail he would have been locked up. Further, even under the plurality opinion below the arresting officer had a right to "frisk" the respondent, thus the "instrusion" into the respondent's pocket to remove the cigarette package—if intrusion that be—was very minimal. Thus, the "violation" here was clearly unsubstantial.

3) *Suppression of the evidence in the instant case will have little or no deterrent effect on future police activity. Amici* believe with the utmost sincerity that most policemen in this country truly desire to comply with the search and seizure guidelines laid down for them by the courts, legislatures and police administrators. Nevertheless, no police officer in his right mind is going to risk his life or safety in order to be absolutely certain that he has adhered to the letter of those restrictions on his conduct, which restrictions—promulgated, as we have

noted above, by judges whose exposures to the dangers that police men face is solely vicarious—may cause the officer to be killed or injured.

The limitations, imposed by the plurality below upon a policeman's right to protect himself in situations which he knows from experience to be dangerous, are both abstractionist and artificial. It is one thing for a given judge to state that it is enough for a policeman to receive "substantial" rather than *total* protection under the law, but it is quite a different matter for the policeman on the street to forego a thorough search—geared to his total protection—when he feels himself endangered, simply because his protection is limited by the "substantiality" test imposed upon him by judicial fiat.

This is not to say that most, or even many, law enforcement officers will intentionally violate the rules governing their conduct. What it means is that an officer, who is in a situation in which he believes himself endangered by a possibly armed individual, is going to do what he believes necessary to disarm that individual first and then worry about the rules concerning the admissibility of evidence. This being the case, the suppression of evidence in this case will not deter the officer who truly believes that he is in danger, and, because most officers are well aware of the dangers of traffic stops and custodial situations, protective searches will probably be made. If, as in the instant case, contraband, turned up in a good faith protective search, is suppressed, we have the anomalous situation of the Exclusionary Rule being used to "punish" a police officer who was doing no more than attempting to protect himself from attack, while it insulates a violator, who was already under lawful arrest, from the consequences of his possession of contraband found in the protective search. In such a situation any deterrent effect on police officers is lost completely.

4) *The law of search and seizure is in such a state of confusion that it is hardly understandable to police officers.* We

ask this Court to consider the fact that as a practical matter, under the law as it presently exists, the absolute sanctions of the Exclusionary Rule must be applied even though the area of law of its application—search and seizure—is perhaps the most complex in the criminal law, or, for that matter, in any area of the law. For example, the "frisk only" rule promulgated by the plurality for custodial traffic offenses is difficult to comprehend and will be even more difficult for police administrators to explain to the average police officer. It is axiomatic that Fourth Amendment law which cannot be understood cannot be enforced. As we have noted, in the instant case, in the lower court sitting *en banc*, four judges argue that the search was valid while five judges found to the contrary. How is a police administrator, or a police legal advisor or a police rule maker[15] going to be able to explain the niceties of such search and seizure law to a twenty-one year old, high school graduate patrolman who may in one day encounter three or four "borderline" situations involving such questions as the difference between (a) a "search" and a "frisk," (b) a custodial and a non-custodial situation or, (c) a pure traffic stop and a traffic stop involving the possibility of other crimes.

The complexities of current search and seizure law, we submit, warrants a more considerate attitude towards police conduct than is embodied in the absolute application of the Exclusionary Rule as it is interpreted today. Must we really "punish" the twenty-one year old patrolman for falling afoul of search and seizure requirements which cause splits in appellate courts such as are evident in the instant case? At least in those areas in which the law is in such a state of uncertainty, we urge this Court to consider a modification of the Exclusionary Rule.

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15. There is currently, at Arizona State University, Tempe, Arizona, a major project being conducted dealing with departmental rule making as a basis for proper police conduct. The director of this project, which is funded by the Ford Police Foundation, is Professor Gerald Caplan, former General Counsel of the Metropolitan Police Department of the District of Columbia.

This Court, as the final arbiter of Constitutional law in this country, has the authority to revise or modify Constitutional rulings. Our argument in this section can be summed up succinctly: We believe that in those areas of Fourth Amendment law in which a "violation" is found to be (1) non-wilful, (2) unsubstantial, (3) not a deterrent to future police misconduct, and (4) a product of the massive uncertainty as to what is or is not correct in the law of search and seizure, the Exclusionary Rule should not be applied as a shield to protect patently guilty defendants from the consequences of their criminal acts.

In the instant case the truth of the matter is that the respondent *was* in possession of heroin. This fact was discovered by Officer Jenks, not by high-handed, malicious, flagrant or wanton abuse of respondent's rights, but rather in the good faith exercise of his discretion as a police officer, in obedience to his departmental regulations. In these circumstances we believe that the Exclusionary Rule should not be applied absolutely and that the cause of justice would be better served by admitting the evidence against respondent than by excluding it.

CONCLUSION.

Traffic stops are dangerous police activities. The facts prove this. The law enforcement officers of this country are entitled to all of the protection which our courts can give them, commensurate with the protection of fundamental individual rights. The lower court's plurality opinion is insensitive to the very real dangers faced by policemen in custodial traffic arrest situations and it relegates the officers' safety to the "substantial" protection of a frisk rather than the total protection of a full blown search. We urge this Court to overrule this holding and to mandate that in cases such as this, lower courts should take a far more realistic and considerate view of the safety of police officers.

Should this Court uphold the search and seizure ruling of the court below, we urge that the Exclusionary Rule be modified

to the extent that it no longer encompasses non-wilful and insubstantial "violations" such as are presented by the facts of this case. The absolute application of the Exclusionary Rule takes a heavy toll upon society by requiring that the guilty be freed while at the same time it imposes no real sanction on improper police conduct. We believe that if the Rule were modified so that only wilful and substantial violations of Fourth Amendment rights were encompassed that society would benefit immeasurably without doing any fundamental damage or injustice to individual rights.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1669

JAMES E. GUSTAFSON, *Petitioner*,

vs.

STATE OF FLORIDA, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Florida

---

No. 72-936

UNITED STATES OF AMERICA, *Petitioner*,

vs.

WILLIE ROBINSON, JR., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT IN NO. 71-1669 AND PETITIONER IN NO. 72-936

INTERESTS OF AMICUS CURIAE

The question presented in the instant cases relates to the permissible scope of a search incident to a

lawful arrest of a traffic law violator for an offense which is serious enough to require a police officer to take the arrestee into custody.[1]

We are vitally interested in the cases for several reasons:

First, we seek a result which will permit a full field search[2] for weapons to ensure the safety of police officers in cases wherein a motorist has been arrested for a traffic offense of sufficient seriousness to require that he be taken into custody. We are particularly concerned about this issue inasmuch as our own Supreme Court has recently curtailed the right of a police officer to conduct even a pat-search in such circumstances unless he can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal. 3d 186, 206 n. 13, 101 Cal.Rptr. 837, 852 n. 13 (1972).

Second, these cases which "are set for oral argument in tandem", also afford this Court an opportunity to re-examine and perhaps re-define the scope

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[1]Not at issue here is a traffic *stop* involving routine traffic infractions for which the officer may only issue a citation. Neither is this a case involving a traffic *detention* for a traffic offense of intermediate seriousness for which the officer may either issue a citation or, if the circumstances warrant, take the violator into custody. Rather, the issue here presented relates exclusively to serious violations of the traffic laws where the *full custody arrest* of the offender is mandatory.

[2]A full field search consists of the following: (1) an initial pat-search for weapons, (2) a thorough search of all pockets and containers wherein weaponlike or even equivocal feeling objects are disclosed or might be concealed. Such a search is a lesser intrusion than the full body search or strip search conducted at a jail prior to confinement therein. See Findings of District Judge Jones in Appendix B, p. 82a of the Petition for Writ of Certiorari in No. 72-936.

of the Exclusionary Rule in both state and federal cases. We do not urge that the Exclusionary Rule be totally abandoned until some meaningful alternative can be developed. Rather, we have accepted the invitation of the Chief Justice to "consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced." *Bivens v. Six Unknown Agents,* 403 U.S. 388, 420-423 (Burger, C. J. dissenting).

Specifically, we urge the Court to adopt a balancing test in lieu of the *per se* rule of exclusion to determine whether evidence obtained in violation of the Fourth Amendment should be admitted or suppressed. The following factors are suggested as being relevant in such a balancing process:

(1) The objective nature and scope of the intrusion. *E.g.,* a technical trespass as opposed to a wholesale exploratory invasion.

(2) The subjective state of mind of the searching officer. *E.g.,* an honest mistake in judgment as opposed to a willful, deliberate, bad faith action.

(3) The public interest in conducting the search, including, for example, the relative gravity of the crime under investigation.

ARGUMENT

I

WHEN A MOTORIST IS ARRESTED FOR A TRAFFIC OFFENSE THAT IS SERIOUS ENOUGH TO REQUIRE HIS BEING TAKEN INTO CUSTODY, THE OFFICER SHOULD BE PERMITTED TO CONDUCT A FULL FIELD-SEARCH FOR WEAPONS FOR HIS OWN PROTECTION.

The risks to the personal safety of police officers inherent in traffic offense encounters is well documented and has been judicially recognized. *E.g., Adams v. Williams,* 407 U.S. 143, 148 (1972). "[E]ven a minor traffic citation incident can occasionally erupt into violence." *People v. Superior Court (Kiefer),* 3 Cal.3d 807, 829, 91 Cal.Rptr. 729, 743 (1970). The danger to the police officer is increased when a traffic law violator is to be taken into custody and transported in a police vehicle. "The critical factor . . . is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed." *People v. Superior Court (Simon),* 7 Cal.3d 186, 214, 101 Cal.Rptr. 837, 857 (1972) (Wright, C.J., concurring).

Therefore, we join with the United States and the State of Florida in urging this Court to authorize full-field searches for weapons in those cases involving lawful arrests for serious traffic offenses when the motorist must be taken into custody.

Such a rule would not create too broad an exception to the general rule that searches be justified by articulation of *specific facts.* Although statistics are not available, it seems fair to assume that full custody

arrests for serious traffic offenses constitute only a small fraction of the millions of routine traffic citation encounters. In this limited category of cases, it would not be an intolerable and unreasonable intrusion into the privacy of the vast majority of peacable citizens who travel by automobile, to permit a full-field search for weapons, not on specific facts, but on the *inherent fact* that there is a significant increase in the danger to the officer in such cases. *Ibid.*[3]

Prior to the California Supreme Court decision in *Simon, supra,* several California intermediate appellate courts had upheld the right of an officer to search for weapons when a motorist was being taken into custody for a serious traffic offense or upon an outstanding traffic warrant for failure to respond to a prior citation. See, *People v. Graves,* 263 Cal.App. 2d 719, 734-735, 70 Cal.Rptr. 509 (1968); *People v. Weitzer,* 269 Cal.App.2d 274, 289-294, 75 Cal.Rptr. 318 (1969); *Morel v. Superior Court,* 10 Cal.App.3d 913, 917-918, 89 Cal.Rptr. 297; *also see People v. Rhodes,* 23 Cal.App.3d 257, 261-265, 100 Cal.Rptr. 487 (1972) [cases summarized in concurring opinion].

[3]It may be observed, however, that the record in No. 72-936 does reveal the articulation of specific facts to support a field search. The arresting officer had knowledge that various small weapons could be concealed on a suspect and recalled that a fellow officer had been recently injured after he failed to uncover a hidden razor blade. See findings of District Judge Jones in Appendix B, p. 81a of the Petition for Certiorari in No. 72-936. In addition, the officer was directed by his department to conduct a field search incident to a custodial arrest. This directive represented the collective judgment of the department regarding the risks inherent in custodial arrests. This collective knowledge may properly be imputed to the arresting officer. *E.g., United States v. Canieso,* 470 F.2d 1224, 1230 n. 7 (2nd Cir. 1972) and cases there cited.

In the above cases, the balance between the interest of society in protecting its police officers and the interest of society in preventing intrusions into privacy was struck in favor of the protective interest in custodial traffic arrest cases. For example, the court in *Graves* and *Weitzer* approved at least a pat-search, but left open the question of a more thorough examination of the pockets if ambiguous feeling objects were disclosed. However, the *Weitzer* court did observe that "a rule which requires identification of a weapon to a certainty from a pat-search might fall short of protecting the officer from subsequent assault." *People v. Weitzer, supra,* 269 Cal.App.2d at 291, 75 Cal.Rptr. at 329.[4]

In *Morel* and the *Rhodes* concurrence, the courts answered the question left open in *Weitzer* and held a full field search to be reasonable to ensure an officer's safety from assault by a suspect carrying a small weapon which would not necessarily be disclosed by a pat-down. *Morel v. Superior Court, supra; People v. Rhodes, supra.*[5] Interestingly, the New Jersey Supreme Court has unanimously reached the same

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[4]The California Supreme Court subsequently indicated that precisely such certainty of identification was required. *People v. Collins,* 1 Cal.3d 658, 662-663, 83 Cal.Rptr. 179 (1970). However, *Collins* did not purport to apply to custodial arrests, but only to investigatory detentions as in *Terry v. Ohio,* 392 U.S. 1 (1968). Neither may *Sibron v. New York,* 392 U.S. 40 (1968), be equated to the instant case. There, the police were looking for narcotics, not weapons, and the search was not incident to arrest.

[5]*Morel* and *Rhodes* also suggest an alternative rationale for upholding pre-custody field searches, namely, the prevention of the disposing of contraband by the arrestee while he is being transported in the police vehicle. *Ibid., and see, People v. Peterson,* 9 Cal.App.3d 627, 630, 88 Cal.Rptr. 597, 598 (1970).

conclusion in an opinion which apparently has heretofore been totally overlooked. *State v. Campbell*, 250 A.2d 1, 5 (N.J. 1967). Without hesitation, it was held that a pat-search which disclosed an ambiguous object justified examination of the object to assure that it did not conceal a weapon. *Id.*

As previously noted, however, the California Supreme Court has recently disapproved the aforementioned line of intermediate appellate cases and curtailed the right to conduct protective searches in traffic arrest cases. Instead, it has prohibited even a pat-search unless the officer can articulate specific facts to support a reasonable belief that the motorist is armed. *People v. Superior Court (Simon)*, 7 Cal.3d 186, 206, 101 Cal.Rptr. 837, 852 (1972).[6]

It is California's position that the majority of the California Supreme Court has incorrectly weighted the balance too heavily against the public interest in ensuring the safety of its police officers. The instant cases afford California an opportunity to persuade the highest tribunal in the country to redraw that balance in favor of police safety, and approve field searches for weapons in custodial arrest cases. As previously indicated, such a ruling would not be an intolerable and unreasonable invasion of the privacy

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[6]In his concurring opinion in *Simon*, Chief Justice Wright interprets the majority decision as not precluding a pat-search when a motorist is taken into custody, as distinguished from merely being given a citation. 7 Cal.3d at 212-214, 101 Cal.Rptr. at 856-857. The majority does not, however, limit its holding to citation encounters. The same rule prohibiting a pat-search is also applied to custodial arrests upon an outstanding traffic warrant for failure to respond to a prior citation. 7 Cal.3d 206 at n. 13. 101 Cal.Rptr. 852 at n. 13.

of the vast majority of peacable citizens who travel by automobile, given the following factors: (1) the limited nature of the intrusion—a field or pocket search for weapons, not a strip search, (2) the limited application of the field search—only to custodial arrests for serious traffic offenses, (3) the increased likelihood of danger to the officer inherent in such custodial encounters and (4) the public interest in protecting its police officers from such danger.

II

THE EXCLUSIONARY RULE SHOULD BE MODIFIED TO REQUIRE APPLICATION OF A BALANCING TEST TO DETERMINE WHETHER EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT SHOULD BE SUPPRESSED OR ADMITTED.

The case against the Exclusionary Rule has been forcefully stated and developed at length in *Bivens v. Six Unknown Agents, supra* (Burger, C. J. concurring) and *Schneckloth v. Bustamonte,* 41 U.S.L.W. 4726, 4735-4743 (1973) (Powell, J. concurring). No purpose would be served by repeating here the many cited arguments and authorities supporting total or partial abandonment of the rule. Rather, we accept the obligation imposed upon those who would criticize existing institutions to present practical, reasonable alternatives thereto. The instant cases, one state and one federal, set to be argued in tandem, offer this Court a timely vehicle to consider proposed modifications of the Exclusionary Rule.

This Court applies a balancing test (governmental interest in searching v. nature and scope of the intrusion) in determining the threshold question of whether evidence has been obtained by means which violate the Fourth Amendment. *Terry v. Ohio,* 392 U.S. 1, 20 (1968). We urge that the Court adopt a similar balancing approach, in lieu of the present *per se* rule of exclusion, to determine the question of whether evidence so obtained should be admitted or suppressed.

With certain limited exceptions, *per se* rules have not been favored by this Court. *(E.g., Chapman v. California,* 386 U.S. 18 (1972); *Milton v. Wainwright,* 407 U.S. 371 (1972).) A *per se* rule of exclusion in search and seizure cases is, we submit, peculiarly inappropriate. As has been repeatedly observed, claims of unlawful search and seizure are distinct from many other constitutional claims, in that the evidence seized has ordinarily not been rendered unreliable by the means of its seizure. Thus, the claim bears absolutely no relation to the defendant's innocence. What must be sought, therefore, is a reconciliation between the contrasting public interests at stake. Chief Justice Weintraub of the New Jersey Supreme Court has aptly summarized these competing interests:

> "The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. . . . The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus con-

secrated, but rather to say that those rights may not be read to defeat the very reason for government itself.

"We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them." *State v. Bisaccia,* 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

We urge that a balancing test to determine whether exclusion is warranted better serves these competing interests, than does a *per se* rule which in effect imposes capital punishment upon evidence obtained by even the most inadvertent technical violation of the Fourth Amendment. We suggest that the following factors are appropriate to be weighed in such a balancing approach:

(1) The objective nature and scope of the intrusion.

(2) The subjective state of mind of the searching officer.

(3) The public interest in conducting the search, particularly with regard to the gravity of the crime under investigation.

The Exclusionary Rule was created to protect the privacy of the individual from certain specific conduct on the part of police officers. The conduct sought to be controlled in *Mapp* was described as "official lawlessness in flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment," *Mapp v. Ohio,* 367 U.S. 643, 655, 657, 658 (1961). The conduct in *Mapp* was precisely that. Three police officers arrived at Miss Mapp's residence pursuant to information that a person was hiding in the home who was wanted for questioning in connection with a recent bombing. The officers knocked on the door and demanded entrance, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Three hours and four additional officers later, the officers forcibly opened the door when Miss Mapp did not respond immediately. Although Miss Mapp's attorney arrived, he was not permitted to see or enter the house. When Miss Mapp demanded to see a search warrant, a paper was held up by one of the officers which she grabbed and placed into her bosom. A struggle ensued in which the officers recovered the paper, handcuffed Miss Mapp because she had been belligerent, and twisted her hand, causing her to yell and plead with the officers.

The prohibited action in *Mapp* falls into two categories: *first,* the subjective factor of the officer's state of mind: deliberate, willful, and in bad faith; *second,* the objective factor of the nature and scope of the intrusion: flagrant, exploratory and substan-

tial. Thus, the activity to be deterred by the Exclusionary Rule is that which deliberately or substantially violates Fourth Amendment rights. To deter this conduct the Exclusionary Rule should be applied only in case of deliberate or substantial violation.

It is contrary to the reasons advanced for the Exclusionary Rule to apply it where the violation by the police officer is both a limited intrusion and an inadvertent, honest mistake in judgment. In order for the deterrence theory to have any validity, the police officer must be able to distinguish right from wrong. He must be able to perceive that conduct which he is to avoid. As was stated by Mr. Justice Traynor in delineating the Exclusionary Rule in *People v. Cahan, supra,* 44 Cal.2d at 448, 282 P.2d at 913: "Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a *choice* between securing evidence by legal rather than by illegal means, officers will be impelled to obey the laws themselves since not to do so will jeopardize their objectives." (Emphasis added.) This will be true only where the police officer knows that he has a choice, that is, only where he knows that his proposed activity would be in violation of Fourth Amendment rights.

Application of the Exclusionary Rule must be tempered with the realization that a police officer is not as well equipped as an appellate court justice to deal with legal subtleties. *See Brinegar v. United States,* 338 U.S. 160, 175 (1949). The police officer does not have the same education, training, or experience as

that of an appellate court justice, nor is the police officer in a position to devote as much time to making a legal determination.

As Judge Friendly has suggested, "It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be forced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965).

Application of the Exclusionary Rule ought also to be adjusted according to the public interest in the search which is at stake in any particular case. Principally, we urge that one of the factors to be considered in the balance is the severity of the crime involved. Justice Cardozo's opinion in *People v. Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People v. Defore, supra,* 213 App.Div. 643, 652, 211 N.Y.S. 134, 142 (1925).

A distinguished member of this Court was similarly inclined:

". . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show proable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *Brinegar v. United States, supra,* 338 U.S. 160, 183 Jackson, J. dissenting).

Also see, People v. Sirhan, 7 Cal.3d 710, 739, 102 Cal. Rptr. 385, 404 (1972); *Dorman v. United States,* 435 F.2d 385, 392 (D.C. Cir. 1970); *People v. Curley,* 12 Cal.App.3d 732, 747, 90 Cal.Rptr. 783, 794 (1970).

The ethical quandary posed by the application of the Exclusionary Rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The Exclusionary Rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of*

Evidence Obtained by Illegal Searches, 43 Cal.L.Rev. 565, 581 (1955).

In this case, the crime does not involve violence nor is it an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the Exclusionary Rule. Nevertheless, as has been discussed earlier in Argument I, there is in fact a compelling public interest for the search herein: ensuring the protection of police officers from a high risk of physical assault, which, like a serious crime of violence, calls into play the considerations articulated by Judge Finch, Justice Jackson and Professor Barrett.

CONCLUSION

It has never been adequately explained why a case like *Mapp,* which involved extremely flagrant deliberate police misconduct used for the prosecution of the most trivial offense necessarily requires the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Without that explanation, the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the Exclusionary Rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The Exclusionary Rule has assumed a scope

far beyond the justifications offered when it was imposed upon the States. There is no valid rationale for its automatic extension to all classes of cases regardlesss of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

The People of the State of California as amicus curiae, respectfully urge the affirmance of the judgment below in No. 71-1669, the reversal of the judgment below in No. 72-936, the adoption of the suggested modifications of the rule in *Mapp v. Ohio*.

Dated, June 26, 1973.

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IN THE

Supreme Court of the United States

No. 72-936

UNITED STATES OF AMERICA,

Petitioner,

vs.

WILLIE ROBINSON, JR.,

Respondent,

(On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit)

No. 71-1669

JAMES E. GUSTAFSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

(On Writ of Certiorari to the Supreme Court of Florida)

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The State of Illinois has a substantial interest in the scope and application of the exclusionary rule. In particular the Supreme Court of Illinois has always followed applicable federal precedents in search and seizure cases. The cognate provisions of the Illinois Constitution are construed as identical in scope and effect as the provisions of the Fourth and Fifth Amendments of the United States Constitution. See *People* v. *Grod,* 385 Ill. 584, 53 N.E. 2d 591 (1944). Initially, the Supreme Court of Illinois refused to apply the exclusionary rule. See *Trask* v. *People,* 151 Ill. 523, 529 (1894). After the adoption of the exclusionary rule in federal courts, the Illinois rule was changed in reliance upon the opinions of this Court. See *People* v. *Brocamp,* 307 Ill. 448, 138 N.E. 728 (1923); *People* v. *Castree,* 311 Ill., 392, 143 N.E. 112 (1924); *City of Chicago* v. *Lord,* 7 Ill. 2d 379, 130 N.E. 2d 505 (1955). It is therefore reasonable to assume that any change in the exclusionary rule made by this Court will affect directly the rules applied by the state courts.

THE RULE EXCLUDING EVIDENCE IMPROPERLY SEIZED SHOULD BE APPLIED ONLY WHEN THE SEIZURE CONSTITUTES A SUBSTANTIAL VIOLATION OF RIGHTS AND ONLY AFTER THE COURT WEIGHS THE QUESTION OF EXCLUSION IN LIGHT OF THE PUBLIC INTEREST IN OBTAINING RELIABLE EVIDENCE FOR THE PROSECUTION OF SERIOUS CRIMES OF VIOLENCE.

I.

The exclusionary rule in search and seizure cases has been the subject of intense debate throughout its existence. The commentary is substantial.

The historical and logical foundations of the rule have been ably and persuasively criticized. See *Wigmore*, "Using Evidence Obtained by Illegal Search and Seizure", 8 A.B.A.J. 479 (1922); Plumb, "Illegal Enforcement of the Law", 24 Cornell L.Q., 337, 354-58, 370-81 (1939); Wigmore, *Evidence*, Secs. 2183-84a (McNaughton Rev. 1961). Nearly every civilized nation in the world has survived as a civilized nation without the benefit of the exclusionary rule. See "The Exclusionary Rule Under Foreign Law" 52 J. Crim. L. C. & P.S. 270 (1961). (series of articles). To our knowledge, no civilized nation has an absolute rule which mandates the exclusion of evidence regardless of social interests which support its admission. See *Lawrie* v. *Muir* [1950] Scots L.T.R. 37.

The policy arguments against the rule have been well stated. See Burger, "Who Will Watch the Watchman", 14 Am. U. L. Rev. 1 (1964); Oaks, "Studying the Exclusionary Rule In Search and Seizure", 37 U. Chi. L. Rev. 665 (1970). And concern over the validity of the rule has not been confined to academicians, prosecutors and policemen

in recent years. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971) (Burger, C. J. dissenting); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J. concurring) (Black and Blackmun, JJ, concurring and dissenting).

II.

At the risk of repeating what has been said before, we think it appropriate to restate our objections to the exclusionary rule.

On ethical grounds, the rule in its direct application, seems unfair. It benefits only the guilty. The innocent man whose rights are violated must sue civilly to secure damages; he must pursue a remedy that this Court has found to be ineffective. Further, the application of the rule punishes society and not the offending officer.

In terms of judicial administration, the rule requires diversion from the fundamental concerns of guilt or innocence. At the very least, the determination of the ultimate question is substantially delayed and witnesses for both sides become discouraged or unavailable. At the worst, counsel for defendants become so concerned with the question of suppression that they never seriously prepare for trial or explore defenses on the merits.

The public perception of the delay, the procedural gamesmanship and the clear benefit to the guilty serves to diminish confidence in the courts.

The exclusionary rule creates a haven for a corrupt policeman or prosecutor. The rule allows the officer to immunize an offender while appearing to do an aggressive job of law enforcement. An officer may conduct a massive gambling raid without securing adequate evi-

dence of probable cause. The officer appears to be doing his job cracking down on gambling only to be frustrated by the courts. The officer may reap both the benefits of public approval and consideration from the gambler. One study found that "an examination of the records and a period of observation of this practice in the court is fairly convincing that the raids are made to immunize the gamblers while at the same time satisfying the public that gamblers are being harassed by the police." Dash, "Cracks in the Foundation of Criminal Justice," 46 Ill. L. Rev. 385, 392 (1951). See also, Peterson, "Restrictions in the Law of Search and Seizure," 52 NW. L. Rev. 45, 57-58, 58-59 (1957). The courts are compromised by aiding this kind of corruption. And the courts, not the police, are the recipients of public disapproval when they suppress meaningful, or overwhelming evidence. The corrupt policeman blames the courts for his ineffectiveness and the courts cannot respond.

The exclusionary rule is thought to deter illegal police conduct. There is no evidence that proves this is so. See Oaks, " Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). The fact that there is no proof of deterrence should cause the rule to be abandoned. If due process requires the exclusionary rule, it would seem clear that the proponent of the rule ought to sustain the burden. It seems clear to us that even without statistics a realistic analysis of the incentives and pressures upon the police would show that the exclusionary rule cannot deter.

The primary pressure upon the police is to apprehend criminals and prevent crime. It is an unceasing public pressure which arises not from some irrational public prejudice but from the indisputable assessment that

crime is both an ethical and social evil.[1] Further, there is the internal standard of every ordinary man in law enforcement that murderers, robbers, etc., ought to be punished for their crimes. The effect of the exclusionary rule in search and seizure cases is not deterrence but perjury. The rule fosters false testimony by law officers who feel they must apprehend offenders and are fearful that minor technical errors will result in their escape. In short, police officers who would not alter their testimony in any respect to help the prosecution establish guilt may well be driven to such extremes when the question is not one of guilt but rather of the admissibility of reliable evidence.

There are institutional pressures which work against deterrence. The police organizational structure asks the policeman why he didn't arrest rather than why he did.[2] The police encourage seizure of contraband and place a premium on police alertness. The desire to prevent crime often causes the police to engage in practices which are not permitted when the object is the prosecution of offenders. The police structure is responsive to public

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1. There are similar pressures upon courts to distort probable cause concepts in order to sustain the admissibility of evidence. See Brinegar v. United States, 338 U.S. 160, 183 (1949).

2. One eminent judge has adopted a standard for search and seizure which reflects this concern: "When a police officer could justifiably be disciplined for failure to act, his action can hardly be characterized as unreasonable." People v. Moore, 35 Ill. 2d 399, 403, 220 N.E. 2d 443, 445 (1966) (Schaefer, J.).

norms. The police do not feel morally blameworthy because the public does not condemn. See Skolnick, *Justice Without Trial*, 219-26 (1966). La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 442-44 (1965).

It is this abiding, powerful and rational pressure to suppress crime that leads police to prefer, in many cases, to engage in the forbidden practices and forego prosecution. The Court has recognized the inability of the rule to deter in certain contexts. See *Terry* v. *Ohio*, 392 U.S. 1, 12-15 (1968). Studies have shown that the police have an incentive to arrest without any thought of conviction. An arrest disrupts illegal business and clears the streets for a time. Narcotics and weapons are destroyed and the arrestee bears the costs of freeing himself through court action. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 422-29, 447-55 (1965); Waite, "Police Regulation by Rules of Evidence," 42 Mich. L. Rev. 679, 685-87 (1944). It is important to reiterate that the police do not act out of malice, they act because the public demands that they act and that demand is more forceful than the demands made by judges.

It is our view that the only effective control upon police conduct is the community in which the police function. Excesses and abuses of police power occur rarely because the citizens will not tolerate them, not because the police fear that months later a judge will suppress

evidence they seize. In our experience, the only effective means of changing police procedures which aggrieve segments of the community is by community pressure. The exclusionary rule has been in effect in Illinois since 1923 and yet there is no evidence that complaints concerning police abuses have diminished. In one city in Illinois, it is claimed that one minority group is persistently harassed by police. Though many allegations have proven unfounded, there have apparently been enough incidents to cause several changes in police procedure and high ranking personnel. The incentive for change was not a new rule of court or a far-reaching opinion but rather the pressure of citizens groups. In light of several recent jury verdicts acquitting unpopular defendants, it seems absurd to argue that the community will tolerate police excesses against minority groups.

In this connection, it is worth observing that an officer who acts in good faith is not going to be deterred by the exclusionary rule. See Horowitz, "Excluding the Exclusionary Rule," 47 L.A. Bar Bull. 91, 92 (1972). By definition, such an officer acts because he thinks, albeit mistakenly, that he is acting within the law. The officer who acts in bad faith will not be deterred, either. "The officer who takes bribes or shakes down prisoners, or extorts money on threat of arrest, or brutally mistreats prisoners or otherwise consciously abuses his authority can be controlled only by the imposition of direct penalties . . . the exclusionary rule has no impact in such a situation." Barrett, "Exclusion of Evidence Obtained by Illegal Searches," 43 Calif. L. Rev. 565, 592-93 (1955).

The incentives and pressures which work against the exclusionary rule are not the only factors which account for its limited value as a tool of deterrence. The rule

itself is applied in a context inimical to its purposes. There is, first, a distinct failure to communicate the rules of search and seizure laid down by courts to the police in a manner comprehensible to the police. La Fave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich L. Rev. 987, 991-93, 1003-1008 (1965). There is also the admitted failure of courts to prescribe consistent and comprehensible rules governing search and seizure. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 483 (1971). It may be inherently impossible to devise coherent Fourth Amendment precepts. If that is the case then the exclusionary rule is clearly out of place. It is unreasonable to expect deterrence when the subject does not know what he is forbidden to do. The lack of clarity in the law contributes to both public and police disrespect for the rules of search and seizure. Nothing is more incomprehensible to the policeman who accepts judicial supervision of searches by securing a warrant than to have another court say that the first court was wrong in issuing the warrant. See La Fave, "Improving Police Performance Through the Exclusionary Rule," 30 Mo. L. Rev. 391, 411-415 (1966).

There is a particularly striking and inexplicable anomaly in our treatment of police officers vis a vis lawyers. We excuse a lawyer who mistakenly judges a law to be constitutional and advises his client to plead guilty. See *Brady* v. *United States,* 397 U.S. 742, 756-757 (1970). Yet by a divided court we condemn a police officer who decides to search upon his mistaken judgment that he has met the requirements of the law. It is unfair to tax an officer, usually a layman, with the endless permutations of search and seizure law. The appearance to the

III.

Many who recognize the validity of objections to the rule will advocate that the rule not be abandoned until a reasonable alternative is provided. The most popular suggestion for an alternative is to provide a remedy reminiscent of Industrial Commission (Workmen's Compensation) procedures. See Horowitz, "Excluding the Exclusionary Rule, Can There Be an Effective Alternative," 47 Los Angeles Bar Bull. 91, 94 et seq. (1972); Barrett, Exclusion of Evidence Obtained By Illegal Searches, 43 Calif. L. Rev. 565, 594-95 (1955). *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 422-23 (1971) (Burger C.J. dissenting).

It seems to us that concern over a viable alternative should not prevent this Court from reconsidering the exclusionary rule. If the exclusionary rule were effective and meaningful as a deterrent, it might be proper to ponder the necessity for replacing it with something else. But it appears that the exclusionary rule cannot and does not serve the purpose of deterrence. If the exclusionary rule has no deterrent effects, its absence will not leave a void to be filled. It might be said that an outright abolition of the exclusionary rule may have a symbolic effect and encourage police abuse. We doubt that this would occur. The public resentment of arbitrary police conduct is now and will remain a primary restraint on the police. Further, the continuation of the exclusionary rule will encourage the other police abuses attendant upon the administration of the rule.

This Court need not resolve the issues presented by a complete abandonment of the exclusionary. Instead, a more modest approach can and ought to be pursued.

The exclusionary rule in federal cases was adopted in *Weeks* v. *United States,* 232 U.S. 383 (1914). The crime there was use of the mails to transport lottery tickets. The police action there was conducted without any authority. It consisted of a complete search of the room of the defendant in his absence and a seizure of his private letters and correspondence and other private papers. Under the rule in *Boyd* v. *United States,* 116 U.S. 616 (1886), the seizure may well have violated the Fifth Amendment.

The exclusionary rule was imposed upon the States in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The conduct of the police in that case can properly be characterized as flagrant. The offense charged could not today be constitutionally classified as a crime. See *Stanley* v. *Georgia,* 394 U.S. 557 (1969). The Court held that it must exclude "evidence secured by official lawlessness in flagrant abuse of that basic right [of privacy]" 367 U.S. at 654-55.

The nature of police conduct in both *Weeks* and *Mapp* was exceptionally violative of the suspect's rights. Indeed, in neither case, did the officers attempt to defend their actions on the merits or as taken in good faith. No rationale appears in either case for applying the exclusionary rule to reasonable, good faith but erroneous action by the police.

Judge Friendly has suggested that "the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 952 (1965). See also A.L.I. *Model Code of Pre-Arraignment Procedure,* §8.02 (2) (Tent. Draft No. 4, 1971). It

appears to us at least that this is what *Mapp* said. When Mr. Justice (then Chief Judge) Cardozo rejected the idea that the criminal should go free because the constable "blundered"[3] he meant exactly what he said. A blundering constable was not the subject of *Mapp*, rather there a deliberate, methodical violation of a suspect's rights was involved.

The exclusionary rule ought to be applied also in light of the severity of the crime involved. Justice Cardozo's opinion in *People* v. *Defore* is often cited but there is significant language in the opinion of Justice Finch in the Appellate Division opinion:

> "To be unable to find a murderer guilty, although competent evidence is before the court to warrant a conviction, for the reason that someone else is guilty of petty larceny in connection with obtaining such evidence seems a handicap rather than a help to the administration of justice." *People* v. *Defore*, 213 App. Div. 643, 652; 211 N.Y.S. 134, 142 (1925).[4]

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3. People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

4. " . . . judicial exceptions . . . should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." Brinegar v. United States, 338 U.S. 160, 183 (Jackson J. dissenting).

The ethical quandry posed by the application of the exclusionary rule without regard to the nature of the crime involved is a significant one. "However much we may be revolted by the methods used by the police to obtain the evidence we cannot rationally say that the defendant whose crime may be at least equally revolting should have a personal right to go free as a result." The exclusionary rule assumes "that the policeman's action always involves a greater social evil than the defendant." Barrett, *Exclusion of Evidence Obtained By Illegal Searches,* 43 Calif. L. Rev. 565, 581 (1955).

Here, in the *Gustafson* case, the crime does not involve violence nor an offense against the person. We would freely admit that the offense in this case would not be a factor requiring the relaxation of the exclusionary rule. Nevertheless, it is a factor that ought to be considered whether it weighs in favor of the prosecution or the defense.

The *Robinson* case, however, involves a more serious offense. Respondent, at the time of his arrest, was in possession of an addictive drug—heroin—in a quantity in excess of that which might be presumed to be for personal use. The offense charged in *Robinson,* thus clearly would be a factor requiring the relaxation of the exclusionary rule.

The other factor that ought to be considered is the nature of the police conduct. In these cases, it is clearly inappropriate to characterize the police conduct as flagrant, deliberately abusive of basic rights or intentionally violative of obvious rules governing search and seizure.[5]

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5. Indeed, in the Robinson case, the police officer conducted the search of respondent pursuant to a Police Department instruction requiring all officers to make a complete field search at the time of any full custody arrest. United States v. Robinson, 471 F. 2d 1082, 1088, fn. 5 (D.C. Cir. 1972).

It is difficult to characterize police conduct approved by five justices of the Supreme Court of Florida and by four judges of the United States Court of Appeals for the District of Columbia Circuit as flagrant and obviously illegal.

It has never been adequately explained why a case like *Mapp* involving extremely flagrant police misconduct used for the prosecution of the most trivial offense leads to the suppression of evidence seized with probable cause in good faith reliance upon a statutorily authorized warrant used for the prosecution of murder as in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Without that explanation the rule should never have been extended to its present breadth.

We do not ask now for the overruling of *Mapp;* we ask that the exclusionary rule be limited to those cases like *Mapp* which caused the rule to be promulgated. The exclusionary rule has assumed a scope far beyond the justifications offered when it was put upon the States. There is no valid rationale for its automatic extension to all classes of cases regardless of the nature of the police conduct and the gravity of the crime. As a minimum measure, the reach of the rule should be reduced to conform with the reasons offered for the rule in *Mapp*.

CONCLUSION

The People of the State of Illinois, as amicus curiae, respectfully urge the reversal of the judgment below in *United States* v. *Robinson*, and affirmance of the judgment below in *Gustafson* v. *Florida*, and the adoption of the suggested modifications of the rule in *Mapp* v. *Ohio*.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-936

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIE ROBINSON, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, and (3) the relevant constitutional provision, statute and regulation involved.

QUESTIONS PRESENTED

A. Whether the Fourth Amendment prohibition against unreasonable searches is violated when a search incident to a lawful arrest for a traffic violation is initiated as an intensive and thoroughgoing search rather than as a limited protective search for weapons when (1) the sole purpose of the search is protective rather than evidentiary and (2) that purpose can be fully effectuated by a limited search.

B. Whether the Government should be allowed to violate the long-established Exclusionary Rule effectuating Fourth Amendment rights by introducing evidence seized in the course of an unconstitutional search pursuant to a traffic offense at the offender's trial on charges unrelated to that offense.[1]

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The District of Columbia Department of Motor Vehicles revoked respondent's operator's permit on September 28, 1962. Respondent signed a receipt for the notice of revocation on March 23, 1963 (A. 16). Five years later, on April 23, 1968, Officer Richard Jenks of the District of Columbia Metropolitan Police Department arrested respondent for the offense of driving after revocation pursuant to 40 D.C. Code §302(d) (1967 ed.)[2] and searched respondent incident to that arrest

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[1] Respondent's reservations as to whether this issue is properly before the Court are more fully set forth at pages 25-26, *infra*.

[2] That arrest was engendered by a prior encounter between respondent and Officer Jenks—a "routine spot check"—during the course of which Officer Jenks noticed that respondent's date of birth differed on the two pieces of identification which he

(A. 8). The search uncovered a crumpled cigarette package containing 14 heroin capsules in the outer breast pocket of respondent's car-coat (A. 34-37). A majority of the court below concluded that the search violated respondent's Fourth Amendment rights because it was not strictly tied to and justified by the protective purpose which render its initiation possible. (Pet. A. 5a).

The Search

The remand hearing focused in part on the mechanics of Officer Jenks' search of respondent (A. 36-42; 48-52). Although Officer Jenks ordinarily employs a "spread-eagle" technique in searching those persons whom he has arrested (A. 42), the search in question commenced with the two men standing face to face (A. 36)[3]; Officer Jenks then placed his hands on respondent's chest (A. 36). At that time his right hand felt an object in respondent's left outer breast pocket (A. 36). The object was not visible

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tendered (A. 5). During the four-day interval between the "routine spot check" and the arrest, Officer Jenks checked both the traffic files and the central criminal files on respondent (A. 6-7). Those files revealed that respondent's correct date of birth was 1927 and that respondent's application for a temporary operator's permit indicated that there had been no prior revocation (A. 17). Officer Jenks specializes in arresting those persons who drive on revoked permits and who obtain permits by misrepresentation (A. 32); "Supercop", Washington Post Potomac Magazine, December 8, 1968 at 67; "Police Private Jenks, 'Revocation Doctor' Wins Another Case", Washington Post, March 22, 1967 §A at 30. Indeed, Officer Jenks had, as of October 1971, made approximately 4000 such arrests (A. 57).

[3]Officer Jenks departed from his usual custom because he was physically much larger than respondent and anticipated no problem of control (A. 42).

and, as Officer Jenks testified, he extracted it and thoroughly examined it:

> Q. What did you do after you felt the jacket pocket?
>
> A. I went into the pocket and pulled this object out and observed it to be a crumpled up cigarette package. As I felt the package, I could feel objects in the package but I couldn't tell what they were. I opened it and [looked] and observed what they were.
>
> Q. Do you recall now whether or not you suspected what was inside the cigarette package or whether you by feel had an idea what was in there?
>
> A. I could feel the package and I knew they weren't cigarettes but I don't remember if I knew what they were or not.

(A. 37)

Officer Jenks placed the cigarette package in his own pocket and continued searching (A. 38). He was unable to recall the precise sequence in which he searched respondent; however, the relevant features included a search around respondent's waistline and down his trouser legs and down into his pockets (A. 38). Officer Jenks was too embarrassed to search respondent's groin area (A. 51) and did not remove anything else from respondent's pockets (A. 38).

The record and the Government's brief indicate that the area of disagreement between the parties is exceedingly narrow. There appears to be agreement in the following statements:

1. *Ordinarily, no search or frisk is permissible incident to a traffic violation.*

The Government's brief correctly states at 31-32, "If respondent's offense were a minor infraction (*e.g.* passing a stop sign or driving without lights), where a summons were to be served and no arrest contemplated, no search of his person would have been permissible; only a frisk would have been justifiable and then only if Officer Jenks had "reason to believe that he [was] dealing with an armed and dangerous individual." . . . ." (citation omitted)

2. *Respondent was arrested for a traffic offense which necessitates a summary arrest.*

Within the District of Columbia, most traffic offenses are defined (and the penalties for violation thereof established) by the City Council and the Mayor/Commissioner. 40 D.C. Code §603 (1972 Supp.); (Pet. A. 66a). The offense of driving after revocation for which respondent was arrested is an exception to this principle: the United States Congress has defined the offense and prescribed the minimum and maximum penalties. 40 D.C. Code §302(d) (1967 ed.). Driving after revocation is a relatively serious traffic offense and the police regulations[4] "reasonably required that Office Jenks take [respondent] into custody and transport him to the stationhouse" (Pet. A. 49a) (concurring opinion).

[4]District of Columbia Metropolitan Police Department General Order No. 3, Series 1959 (April 14, 1959).

3. *There was no evidentiary basis for the search of respondent.*

The legitimate objectives of an arrest-based search of the person are (1) seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its destruction or concealment, and (2) removal of any weapons which the arrestee might use to resist arrest, effect escape, or inflict injury on the arresting officer or himself. *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *Katz v. United States*, 389 U.S. 347, 357 n.20 (1967); *Preston v. United States*, 376 U.S. 364, 367 (1967); (A. 88-89). These two objectives are commonly referred to as the evidentiary and protective bases of the search. The Government has conceded that the search of respondent was totally lacking in evidentiary purpose (A. 102) (Government's brief at 20).[5] As Judge Wilkey succinctly stated in his dissent below, "this was not an evidentiary search." (Pet. A. 65a). Thus, the search in question was motivated solely by protective justifications.

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[5] That concession was inescapable both in the particulars of this case and as a general proposition relating to the offense of driving after revocation. As noted previously, at the time of the April 23 arrest, Officer Jenks had an airtight case against respondent for the offense of driving after revocation based on his examination of the traffic records which included respondent's signed receipt for the notice of revocation. (Government's brief at 20).

See also, Metropolitan Police Department General Order 23, June 8, 1971; which reads in pertinent part:

> Full custody traffic arrest. An officer arrests a driver of a vehicle for driving after revocation. . . . Areas beyond his immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation.

4. *Officer Jenks did not perceive respondent as armed or dangerous.*

The Government concedes that "... in searching respondent, [Officer Jenks] was not motivated by a feeling of imminent danger and was not specifically looking for weapons" (Brief at 34). Respondent agrees. The present case is devoid of any evidence that Officer Jenks had specific and articulable facts supporting a reasonable belief that respondent was armed or dangerous. Indeed, Officer Jenks admitted that he had no specific purpose in mind when he searched respondent, "I just searched him, I didn't think about what I was looking for. I just searched him" (A. 45).

5. *Officer Jenks' search complied with District of Columbia Metropolitan Police Department instructions*

The search by Officer Jenks was in conformity with current police practice in the District of Columbia which allows a full search at the time of all in-custody arrests. Sergeant Donaldson so testified:

> Q. Now, directing your attention to the field type search. When is a field search instructed to be conducted by a police officer?
> A. At any time he makes a full custody arrest. That is where he would arrest a subject and subsequently transport him to a police facility for booking.
> (A. 87-88).

6. *Respondent was searched rather than frisked.*

The Government has consistently conceded[6] that Officer Jenks' search of respondent exceeded the permis-

[6] *See*, Pet. A. 8a-9a and accompanying text.

sible scope of a limited protective search for concealed weapons. For purposes here, the one crucial difference between a protective weapons search—a frisk—and a full (or so-called field) search is that the arresting officer conducting a full search is expected to routinely examine any object he might find on the suspect; the officer conducting a frisk may remove and examine only those objects he reasonably believes may be weapons (A. 88).

Had Officer Jenks conducted a frisk or pat-down type search, it is unlikely that the contents of the cigarette package would have been examined. This was brought out on the cross-examination of Sgt. Donaldson:

> Q. So that if an officer conducting a pat-down put his hand on the left breast pocket of an outer garment, a car-coat ... and felt in there something that gave when it was squeezed, did not indicate that it had any sharp edges, did not indicate that it was made of metal, did not appear to be of appreciable size, under the instruction and training you give, he should have passed on without going into that pocket, right?
>
> A. Yes, sir.
>
> (A. 96).

There is, however, a gossamer dividing line between frisk and search. Certainly a frisk, even if it may "realistically be characterized as something less than a 'full' search" is nevertheless a serious and considerable intrusion. *Terry v. Ohio*, 392 U.S. 1, 26 (1968). The by-now standard definition of the limits[7] of a frisk approved in *Terry v. Ohio* illustrates the point:

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[7] As generally interpreted, a frisk commences with an external patting of the suspect's outer clothing. *Terry v. Ohio, supra*, 392 U.S. at 29-30; ALI, Search and Seizure, §110.2(4), (cited in the dissenting opinion below at Pet. A. 75a n.33.). District of Columbia police recruits are taught the mechanics of frisking in accordance with these interpretations (A. 87).

> [T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.
> *Terry v. Ohio, supra,* 392 U.S. at 17 n.13 quoting Priar & Martin, "Searching and Disarming Criminals," 45 J. Crim. L.C. & P.S. 481 (1954).

Secondly, a protective frisk may at any time *evolve* into a full search if the suspicions of the frisking officer are reasonably aroused.[8] This is precisely the two-step frisk-search procedure approved by the Court in *Terry v. Ohio;* the officer in *Terry* "did not place his hands in [the suspects'] pockets or under the outer surface of their garments *until* he had felt weapons . . . ," 392 U.S. at 29-30 (emphasis added).

SUMMARY OF ARGUMENT

A search incident to a valid arrest is nevertheless a search and is therefore subject to the Fourth Amendment prohibition against unreasonable searches. In determining that the non-evidentiary search of respondent was unreasonable, the majority below correctly balanced the sole governmental interest—that of assuring that the arrestee with whom the police officer deals is not armed—against the arrestee's considerable expectation of privacy. The question presented is not whether the process of arrest, even for a traffic offense, is frequently perilous. Rather the question is whether or not the danger to the arresting officer is greater when the search is commenced as a frisk

[8] That concept is inapplicable to the facts of this case inasmuch as Officer Jenks never articulated a suspicion that the crumpled cigarette package contained a weapon.

rather than as a full search. In this regard, neither the Government's statistics nor the testimony of the Government's experts at the remand hearing support the Government's position that a full search at the outset is necessary. The Government's elevation of existing search practices of the District of Columbia Metropolitan Police Department to the level of constitutional reasonableness was specifically rejected by even the dissenting judges below (Pet. A. 77a).

In all relevant aspects, the non-evidentiary search of respondent corresponds precisely to the Fourth Amendment intrusion described by the factual situation in *Terry v. Ohio*, 392 U.S. 1 (1968), and should be limited in accordance with *Terry* and its companion cases.

The Government's attack in this Court on the Exclusionary Rule is surprising since that topic never received more than footnote treatment below. The deterrent effect of the Exclusionary Rule is greatest when, as here, the police purpose of obtaining convictions by means of the unconstitutional search is evident. The argument that the Exclusionary Rule allows the guilty to go free is simply an argument that, in matters of criminal justice, the end is more important than the constitutional means. Note, "Judicial control of Illegal Search", 58 Yale L.J. 144, 161 (1948). Finally, as a practical matter, there is no acceptable alternative for enforcing Fourth Amendment rights.

ARGUMENT

I.

THE SEARCH OF RESPONDENT VIOLATED HIS FOURTH AMENDMENT RIGHTS BECAUSE IT WAS NOT REASONABLY RELATED IN SCOPE TO THE CIRCUMSTANCES WHICH JUSTIFIED ITS INITIATION.

A. Introduction

Respondent stresses at the outside of this discussion the exceptional narrowness, in terms of both the time reference and the likelihood of recurrence, of the main issue presented for review. The time frame under consideration extends only from the time the police officer makes a traffic arrest requiring immediate custody until the officer and suspect arrive at the stationhouse.[9]

The four key factors triggering the decisions below are (1) a search is conducted incident to a lawful arrest rather than pursuant to a search warrant; (2) the underlying offense, although one which necessitates a summary arrest, is at the same time one for which it is unreasonable to assume that the arrestee will be in possession of fruits, instrumentalities, or other instruments of the offense; (3) a reasonably prudent police officer would not be warranted in the belief that the arrestee was armed or otherwise presented a threat to the officer's safety; and (4) the controversial item would be uncovered by a full search and not by a properly conducted frisk.

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[9] If the arrestee is to be detained in the cell block—rather than released on collateral or bond—a different and more thorough search procedure comes into play. *See, United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231 (1972); *People v. Superior Court of Los Angeles County [Simon]*, 7 Cal.3d 186, 101 Cal. Rptr. 837, 853, 496 P.2d 1205, 1221 (1972) (en banc).

B. A Search Incident to a Lawful Arrest Is Subject to the Reasonableness Test of the Fourth Amendment.

The fact that respondent was lawfully arrested did not confer *per se* reasonableness on the attendant search. Under the Fourth Amendment the validity of all searches and seizures turns upon their reasonableness, and even when there is a valid arrest the search must be reasonably incident to the arrest. *United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231, 1234 (1972) (en banc); *See also, Chimel v. California*, 395 U.S. 752, 762 (1969), "A similar analysis [that the scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible] underlies the 'search incident to arrest' principle and marks its proper extent"; *Beck v. Ohio*, 379 U.S. 89, 91 (1964), "There are limits to the permissible scope of a warrantless search incident to a lawful arrest . . ."; *Schmerber v. California*, 384 U.S. 757, 769 (1966). Indeed, two of the dissenting judges below have recently stated:

> Sanction of searches incident to arrest, however, 'does not mean that [the person arrested] is subject to any and all searches that the arresting officer may wish to conduct'. . . . The touchstone both as to whether the search is warranted and the propriety of its scope remains reasonableness.
> *United States v. Green*, 151 U.S. App. D.C. 35, 37, 465 F.2d 620, 622 (1972) (Tamm and Wilkey, J.J.) (citation omitted).

Thus, the fact of arrest does not shortcut the discriminative analysis of reasonableness required when Fourth Amendment rights are in issue.

C. The Search Procedure Advocated by the Government Would Inflict a Very Considerable and Unexpected Intrusion on the Person of the Arrestee With No Corresponding Gain in the Sole Governmental Interest Justifying That Intrusion.

The assessment of the reasonableness of the search of respondent, as with all Fourth Amendment intrusions, commences with a balancing of the Government's need to search against the invasion which the search entails. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

The singular governmental interest which purportedly justified the search of respondent is the protection of the arresting officer.[10] The Government argues that every arrest—including those for traffic offense—are inherently dangerous and supports this argument with a mass of statistics. That statistical approach is questionable in general[11] and, in the particulars of this case, lacking in probative value. As the Government acknowledges, *there are no specific figures which relate to the precise problem at hand:* "Specific figures for custodial arrests for traffic

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[10]A concealed weapon might also be used by the arrestee to inflict injury upon himself (A. 89) and thus the protective purpose of the search encompasses the safety of the individual arrested as well as the safety of the arresting officer. However, since presumably the same weapons would inflict either type of injury, a search sufficient to protect the officer would also suffice to protect against self-injury by the arrestee. (Pet. A. 32 n.31).

[11]Disraeli's admonition on the uses of statistics is equally forceful today: "There are three kinds of lies: lies, damned lies, and statistics." (quoted by Mark Twain in *Autobiography*, Vol. I, p. 246.). In this regard, the F.B.I. statistics on which the Government relies are particularly suspect: *See*, Zeisel, "F.B.I. Statistics—A Detective Story", 59 A.B.A.J. 510 (May, 1973).

offenses are unavailable. Nor is information available under the Uniform Crime Reporting Program that relates specifically to the number of policemen killed or assaulted after a "frisk" or "pat-down" had been completed." (Government's brief at 23 n.9).[12]

Moreover, the F.B.I. statistics disclose only half the picture. They are *absolute* figures as to the number of police casualties per activity; they fail to indicate the *relative* frequency with which law enforcement officers engage in each activity. This incommensurability did not escape the majority below: "These statistics, however, must be placed in proper perspective. Considering the millions of traffic arrests made annually, the fact remains that these arrests constitute possibly the safest of all law enforcement activities." (Pet. A. 24a n. 22).[13]

The remainder of the Government's statistics are basically irrelevant. Judge Wilkey's dissent below cites certain statistics taken from the International Association of Chiefs of Police Annual Law Enforcement Casualty Summary (July 1970 - June 1971). (Pet. A. 64a n. 20). Other portions of that publication indicate that the category of weapons which inflicted more police casualties than any other category is "personal weapons"–defined as "hands, feet, teeth, etc." *Id.*, at 40, 47. That statistic is

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[12]After a presumably zealous search of existing records, the Americans For Effective Law Enforcement, the International Association of Chiefs of Police and the District of Columbia Metropolitan Police Department, in their *amicus curiae* brief at 17-18, are able to "document" only seven such incidents in the last *twenty years* and only two of those resulted in injury. With all due respect, the Government's solution is bigger than the problem.

[13]The majority's criticism was directed to the statistics compiled by the International Association of Chiefs of Police in its Annual Law Enforcement Casualty Summary (July 1970 - June 1971). The criticism applies with equal validity to the F.B.I. statistics.

borne out by the F.B.I. Uniform Crime Reports–1971 at 164 Table 60: 81% of assaults on police officers during 1971 were with "hands, fists, feet, etc." Obviously, those weapons will be available to the arrestee *regardless of the thoroughness of the search.* Secondly, the Government's statistics relating to homicides during a traffic arrest do not clearly bear on the issue at hand because they do not identify at what point in the arrest transaction the homicide occurs. Indeed, these statistics indicate that the homicide is likely to occur when the officer *approaches* the vehicle rather than during the subsequent search or trip to the stationhouse. (Government's brief at 23, citing *Adams v. Williams,* 407 U.S. 143, 148 (1972). Additionally, the statistics referred to in *Adams, supra,* indicate that the vast, vast majority of police fatalities are inflicted by gunshot rather than by cleverly designed clandestine weaponry. *See also, Terry v. Ohio, supra,* 392 U.S. at 24 n.21. Finally, because of the narrow time reference of this case and because of the Government's insistence that the danger to the arresting officer flows from the fact of arrest "with its attendant proximity, stress and uncertainty," the most relevant category from the F.B.I. data is "handling, transporting, custody of prisoners" which, after "civil disorders," and "unprovoked mentally deranged" is the least dangerous police activity. F.B.I. Uniform Crime Reports–1971, at 43 Table 22.

The real problem with the statistical approach is that it simply misses the point of this controversy. Respondent does not deny that the process of arrest, even for a traffic offense, is occasionally perilous. However, the question before the Court is not whether that danger exists but rather the extent to which it is diminished when a full search rather than a protective search for weapons is

conducted. The Government had full opportunity at the remand hearing to establish that a full search rather than a frisk is required to fullfil the protective purposes of a non-evidentiary search. The testimony of its expert witnesses did not support its position.

Officer Jenks entered the courtroom with a .22 magnum Derringer in the breast pocket of his overcoat; the weapon was roughly five inches long and ¾ inches wide. (A. 45). On cross-examination, Officer Jenks testified that, in the course of a frisk corresponding to the *Terry v. Ohio* definition of the term, he would have detected the gun since his suspicions would have been sufficiently aroused to have investigated the object further.[14]

Ronald Newhouser, a recognized expert[15] in clandestine weaponry, also testified for the Government at the

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[14]Q. Let's get to that. Specifically, if you found it in the breast pocket of the suit that I am wearing or the suit that you are wearing and you were conducting a pat-down and felt an object like that, would not your suspicions be aroused as to what it was?

A. Yes.

Q. And, in the light of your experience, wouldn't you be very suspicious that it was a weapon?

A. Well I would be suspicious that it was a weapon but with this type of weapon it would be hard to detect what it was.

Q. Well, you wouldn't let those suspicions go unfounded, but you would reach in and find out what it was, wouldn't you?

A. Yes, sir.

Q. And because you would be apprehensive that it was a weapon?

A. I would reach in to find out if it was a weapon for my own protection.

(A. 50).

[15]Mr. Newhouser is supervisor of the National Bomb Data Center; he has taught courses in clandestine weaponry both internationally (to the Thai military and civilian authorities, for example) and domestically (to certain metropolitan police forces and to military and federal agencies) (A. 60).

remand hearing. (A. 59-82). During the course of his testimony Mr. Newhouser removed from his person twenty-five weapons that could kill or incapacitate. (A. 64). Under cross-examination and confronted with the *Terry v. Ohio* definition of frisk, Newhouser testified that all of the twenty-five concealed weapons would be discovered:

> Q. Now, with respect to a search meeting the description I just read [the Priar & Martin definition of frisk in *Terry v. Ohio*] can you tell me which of the weapons carried on your person into the courtroom today would, in your expert opinion, still escape detection?
>
> A. If it was conducted as you read that description and it were conducted at a time and a place where you had no outside pressures, you would probably get almost all of them. I can't think of any of them that might be missed.
>
> (A. 81)

On the immediately following redirect examination Newhouser explained that his answer on cross-examination had included the concept that "as you found the suspicious items you would have to follow the lead." (A. 82). That concept is, of course, well within the concept of frisk authorized by *Terry v. Ohio.*

In a sense, Newhouser's testimony proved too much. He testified on cross-examination that the only means of eliminating *all* possible risk to the arresting officer is to allow him to spread-eagle the arrestee, strip him of his clothing and examine it, and feel into the arrestee's body cavities. (A. 79). He also testified that type of search is peculiarly ill-suited to an on-the-street arrest (A. 79).

Finally, the Government called Sgt. Donaldson of the District of Columbia Metropolitan Police Department.

Sgt. Donaldson is one of the two members of the force responsible for teaching the mechanics of conducting a search to police recruits. (A. 86). He testified that within his own experience and his knowledge of other officers' experience the following weapons had been encountered during in-custody searches: ice picks, revolvers of all kinds, sawed-off shotguns, knives, letter openers and razor-blade box openers. (A. 85). On cross-examination, Sgt. Donaldson conceded that all of these weapons would be detected in the course of a *Terry*-type frisk. (A. 98-100).

Thus, in focusing on the governmental interest of protection which was the sole justification for the search of respondent, neither the Government's statistics nor the testimony of the Government's witnesses at the remand hearing support its position that a full search rather than a carefully conducted frisk diminishes the potential danger to an arresting officer. Rather, that hearing proved only that the strip-search necessary to afford total protection for the arresting officer is, aside from the constitutional questions involved, totally unfeasible for on-the-street full custody arrest.

Turning to the interest of the individual—the other half of the balancing equation—it is clear that even a frisk is "a serious intrusion upon the sanctity of the person . . ." *Terry v. Ohio, supra,* 392 U.S. at 17. The Government assumes that an arrestee has only a "minimal interest of privacy remaining after a lawful arrest" and that a post-arrest search is only a "small additional intrusion" (Government's brief at 29). That assumption is contrary to law. First, as noted earlier, even a search incident to a lawful arrest must be strictly tied to the circumstances rendering its initiation permissible, *Chimel v. California,* 395 U.S. 752, 762 (1969); any unnecessary or unjus-

tifiable intrusion, however small, is therefore unreasonable. Secondly, the Government deliberately disregards the impact on the present case of the *en banc* decision of the court below in *United States v. Mills*, ___ U.S. App. D.C. ___, 472 F.2d 1231 (1972).[16]

Mills was arrested for the traffic offense of driving without a proper permit. As with driving after revocation, that offense necessitates a summary arrest and a trip to the stationhouse (Pet. A. 25a n.23). At the stationhouse, Mills was required to relinquish the contents of his pockets which included twenty-two capsules of heroin and thirty-three capsules of cocaine. *United States v. Mills, supra,* 472 F.2d at 1234. The *en banc* six to four decision reversed the ensuing narcotics conviction and ordered the suppression of the narcotics evidence on the grounds that the pocket search violated the Fourth Amendment requirement of reasonableness because Mills had been denied his opportunity to post collateral and avoid further detention.

Applying *Mills* to the present case, it is problematical whether respondent would have been fully searched at the stationhouse had Officer Jenks conducted only a frisk at the time of the arrest. Respondent could have been released for the traffic offenses without any stationhouse detention or search of his person by posting either cash or bail bond in the requisite amounts. (Pet. A. 36a n.35).

Mills is relevant to the case at hand for the following reasons:

(1) In the District of Columbia a search incident to a lawful in-custody arrest cannot be viewed as a precursor of

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[16]Mills was reargued *en banc* on February 26, 1971 in tandem with the first *en banc* reargument of the instant case. *The Government did not petition this Court for a writ of certiorari in Mills.*

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an inevitable stationhouse search; it must stand or fall on its own reasonableness at the time.

(2) A person lawfully arrested in the District of Columbia does have a considerable expectation of privacy—extending to the contents of his pockets—up to the time there is no alternative to cell block detention.[17]

In summary, in challenging the correctness of the decision below, the Government simultaneously underestimates the arrestee's expectation of privacy at the time of the arrest and overestimates the danger to the arresting officer when "only" the *Terry*-type frisk is conducted. Sanctity of the person from unreasonable intrusions by governmental agents is the norm in this country. The procedure contended for by the Government in this case would violate that norm by inflicting a very considerable and unexpected intrusion on the person of the arrestee without any corresponding gain in the governmental interest justifying that intrusion. The decision below correctly balances the competing Fourth Amendment interests and should be affirmed.

D. A Search Having Only a Protective Justification Is Indistinguishable From the Search Described in and Limited by *Terry v. Ohio*.

The Government improperly characterizes *Terry v. Ohio*, 392 U.S. 1 (1968), as a pre-arrest case and as

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[17]The result in Mills—that stationhouse searches are not appropriate when the arrestee may be released without incarceration—is not peculiar to the District of Columbia. *See, California v. Mercurio*, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); *Carpio v. Superior Court, County of Santa Barbara*, 19 Cal. App. 3d 790, 97 Cal. Rptr. 186 (1971); *People v. Overlee*, 174 Colo. 202, 483 P.2d 222 (1971) (en banc); *State v. Gwinn*, 506 P.2d 187 (Ore. Ct. App. 1973).

inapplicable to a lawful arrest situation (Government's brief at 16-17). In point of fact, *Terry v. Ohio* is a *Fourth Amendment* case rather than a "stop and frisk" case: that is the entire thrust of part II of the *Terry* opinion, *id.* at 16-20, in which the Court "emphatically" rejected the notion that police conduct at the pre-arrest level is outside the purview of the Fourth Amendment and found "danger" in the logic which distinguished between a frisk and a search.[18] *Id.* at 16-17.

The Court in *Terry v. Ohio* attempted to distinguish between a protective search for weapons and a search incident to arrest. *Id.* at 25-26. That distinction is invalid here because it is based on the premise that an arrest-based search—although justified in part by the need to protect the arresting officer from assault with a concealed weapon—"is also justified on other grounds . . . and can therefore involve a relatively extensive exploration of the person" *Id.* at 26. In support of the reference to "other grounds" the Court cited *Preston v. United States,* 376 U.S. 364, 367 (1954), which holds:

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime. . . ."

Thus, the "other grounds" which arguably support a distinction between the scope of a limited protective

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[18]The Court stated:

> In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. *Id.* at 18 n.15.

search for weapons and a search incident to a lawful arrest are none other than the evidentiary grounds lacking in this case. Put another way, when a search concededly has no evidentiary purpose, the distinction between a full search and a *Terry*-type search vanishes.

In *Terry*, this Court held that a Fourth Amendment intrusion having *only* a protective justification must be something less than a full scale search.

> "The sole justification of the search ... is the protection of the police officer and others nearby and it must, therefore, be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for the assault of the police officer." *Id.* at 29.

The Court held that a pat-down or frisk was an appropriately limited intrusion even though the officer in *Terry v. Ohio* had reason to believe that the individual with whom he was dealing was armed and dangerous. As noted above, Officer Jenks did not believe that respondent was armed and dangerous. The Government, nevertheless, asks this Court to hold that where the protective justification is less specific and compelling than in *Terry v. Ohio*, the Fourth Amendment intrusion may be more extensive.[19]

The Government defends its position on the grounds that an arrest engenders a prolonged and stressful period of proximity between officer and arrestee (Government's brief at 23). The majority opinion below concedes that

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[19]The Government's position, put another way, is that as between two officers searching for weapons rather than evidence, the officer who has reason to believe that suspect is carrying a weapon must commence his search with a patdown, while the officer who has no reason to believe that the suspect is armed may make a full-blown search at the outset.

an arrest is potentially more dangerous than a stop-and-frisk, not because of a greater likelihood that a person taken into custody is armed but rather because of "the increased likelihood of danger to the officer *if* in fact the person is armed". (Pet. A. 27a citing *People v. Superior Court of Los Angeles County [Simon]*, 101 Cal. Rptr. 837, 857, 496 P.2d 1205, 1225 (1972) (en banc).

However, even if that difference exists,[20] the decision below makes allowance for it by permitting an arresting officer to conduct the weapons search in *every* in-custody arrest situation without regard to whether he reasonably believes the suspect is armed.

E. Remaining Issues

The remaining issues raised by the Government relating to the reasonableness of the search of respondent do not require extended discussion.

1. *The existing search practices of the District of Columbia Metropolitan Police Department are not determinative of Fourth Amendment reasonableness.*

Respondent agrees that Officer Jenks' search of respondent at the time of the in-custody arrest fully

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[20]The necessity for a reliable protective search appears equally important in the stop-and-frisk situation as in the arrest situation. The stop-and-frisk situation creates the possibility that the suspect frisked will be loosed on his unarmed fellow citizens. Moreover, in a *Terry v. Ohio* situation, the police have only one chance (and that chance is a frisk) to assure the protection of themselves and others; the police in an arrest situation may well have the opportunity to re-search the suspect at headquarters. The continuing relationship between officer and arrestee may include the opportunity to conduct subsequent searches.

complied with existing departmental practice. However, as the dissent below recognized, "The fact that Officer Jenks was following routine police procedure of course does not validate either the decision to search or the scope of the search." (Pet. A. 77a). The benefits of standardization enumerated by the Government[21] are benefits which would result from any standardized instruction regardless of its content. The genesis of the existing search practices is unknown; there is nothing in the record to support the Government's contention that the existing methodology constitutes the distilled wisdom and experience of the entire District of Columbia police force (Government's brief at 10, 31).

2. *Implementation of the majority decision below is eminently feasible.*

Respondent disagrees with the Government's position that the decision below draws "an artificial and impractical" line (Government's brief at 29). It is the same line which this Court drew in *Terry v. Ohio.* Moreover, there are only a few offenses for which the arresting officer could not reasonably assume that the arrestee possessed fruits, instrumentalities, or other evidence of the offense. (Pet. A. 18a); *Chimel v. California,* 395 U.S. 752, 773 (1969) (dissenting opinion of Justice White). And, to some extent, these non-evidentiary offenses have been previously identified by the District of Columbia police. *See,* District of Columbia Metropolitan Police Department General Order 23 (June 8, 1971) quoted at page 6, *supra.*

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[21]The standardized procedures are "designed to maximize simplicity, clarity of instructions, and standardization of procedures . . . so that in time of stress he will instinctively take the correct action." (Government's brief at 20).

II.

IF THE SEARCH OF RESPONDENT WAS UNREASONABLE BY FOURTH AMENDMENT STANDARDS, THE EVIDENCE UNCOVERED BY THAT SEARCH SHOULD BE SUPPRESSED.

The Government urges this Court, if it finds that the search of respondent infringed his Fourth Amendment rights, to nevertheless declare the evidence uncovered by that search admissible at trial (Government's brief at 37-45). That position is contrary to all prior relevant decisions of this court which, as the Government concedes, have allowed "no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof." *Davis v. Mississippi*, 394 U.S. 721, 724 (1969); *see also, Weeks v. United States*, 234 U.S. 383 (1914); *Alderman v. United States*, 394 U.S. 165, 171 (1969); *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 603 (1961); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).

Prior to addressing this question on the merits, respondent makes the following preliminary observations:

1. The Government asks this Court to overturn sixty years of consistent precedent. A determination of that seriousness and magnitude should be undertaken only after careful study and the full operation of the adversary system. Yet, until this case reached the Supreme Court level, the question of whether the Exclusionary Rule should be partially abandoned was, at best, a peripheral issue in this case. The Government raised it most strenuously in its "Petition for Rehearing and Suggestion for Rehearing En Banc." Respondent could not oppose

that petition, Fed. R. App. P. 40(a). Subsequently, the Government footnoted the point in its February, 1971 Supplemental Memorandum. The majority opinion below, following the Government's lead, accorded the topic half a footnote (Pet. A. 32a n.31).

More importantly, the thrust of the Government's argument against the Exclusionary Rule below was that its deterrent effect was unavailing in the circumstances of this case. In this Court, the Government has changed its emphasis to the argument that inadvertent, honest, and technical invasions of Fourth Amendment rights should be outside the scope of the Exclusionary Rule (Government's brief at 40-45). There is nothing in the record below, such as testimony from police officials in States which had not voluntarily adopted the Exclusionary Rule prior to *Mapp v. Ohio*, which bears either on the deterrent effect of the Exclusionary Rule or on the relative number of maliciously-motivated searches with and without the Rule. Respondent respectfully suggests that this issue has not received the full focus and consideration of the courts or counsel below as to render it appropriate for decision in this forum.

2. A major change in the application of the Exclusionary Rule would expose the Court to the type of criticism foreseen by Justice Harlan in his dissent in *Mapp v. Ohio*, 367 U.S. 643, 677 (1961), "I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions." *See also, Chimel v. California*, 395 U.S. 752, 771-72 (1969) (dissenting opinion of Justice White).

Respondent's objections to the merits of the Government's proposal are as follows:

1. The search of respondent presents a factual situation in which the deterrent effect of the Exclusionary Rule is maximized. The Rule's deterrent effect on lawless police conduct is variable:

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of some other goal."
> *Terry v. Ohio, supra,* 392 U.S. at 14.

The present case is one in which obtaining respondent's conviction—*on the narcotics offense*—was the overriding justification for the search. Officer Jenks checked respondent's criminal records prior to arresting him and was therefore aware of his past narcotics involvement (A. 7) (R. 26). The Government's protestation that the search was conducted only to assure the protection of Officer Jenks—and not in order to obtain some sort of conviction—is refuted by the method of that search. In avoiding respondent's groin area, Officer Jenks spurned the full protection which was available to him even under a frisk. The protective justification of the search is premised on the theory that respondent was potentially *dangerous as a traffic offender;* respondent was never even booked on the traffic charges (R. 26). There is in fact some tension between the Government's dual position that, on the one hand, the search was motivated solely by protective purposes and, on the other, that the evidence obtained should be admissible. If

the search is purely protective, the discovery of harmless items should be immaterial.[22]

Geographically speaking, within the District of Columbia the Exclusionary Rule has a substantial deterrent effect. The Rule has been criticized on the grounds that the sanction becomes decreasingly effective as the judicial proceeding requiring the suppression becomes increasingly remote from the offending officer.[23] See, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 416-17 (1971) (dissenting opinion of Chief Justice Burger); Inbau, "Restrictions in the Law of Interrogation and Confessions", 52 Nw. U.L. Rev. 77-78 (1957). Because prosecutors in the District of Columbia review all cases before they are presented in court and *nolle prosse* those in which the evidence is likely to be suppressed,[24] the sanction of the Exclusionary Rule is remote neither in terms of time nor judicial authority from the offending officer.

Finally, the assumption that the Exclusionary Rule lacks effectiveness if not immediately and personally applied is itself questionable. Its deterrent effect operates indirectly as well:

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[22]That was the point of Chief Judge Bazelon's concurrence below: "For now, it suffices for me that when an officer conducts a post-arrest in-custody search for protective purposes alone, he may not search objects that he has removed or that he can reasonably remove, from the control of the arrestee." (Pet. A. 53a)

[23]*I.e.*, the deterrent effect is most effective when the officer is aware that his error has damaged or destroyed the prosecution of the case (as he would be at the conclusion of the hearing of a motion to suppress, or when that hearing is not followed by a trial) and least effective when the sanction is applied years later by means of an appellate court reversal.

[24]Oaks, "Studying the Exclusionary Rule in Search and Seizure", 37 U. Chi. L. Rev. 665, 688-89 (1970).

"That the exclusionary device does not deter the individual searcher is not proof of its inefficiency. The rule operates to hold the prosecutor and the police chief responsible for illegal search by their investigators, and to punish the . in a real sense by marring their record of convictions and their reputation for effective and proper law enforcement."
Note, "Judicial Control of Illegal Search", 58 Yale L.J. 144, 162 (1948).

2. This court has held with increasing vigor that law enforcement officers must, wherever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, e.g., *Terry v. Ohio, supra*, 392 U.S. at 20 and cases cited therein. A primary effect of this court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), making the Exclusionary Rule applicable to state criminal proceedings was its beneficial effort on resort to search warrants. *See*, Kamisar "On The Tactics of Police-Prosecution Oriented Critics of the Courts" 49 Cornell L.Q. 436, 441 (1964), noting that in, for example, Minneapolis, only two search warrants had been issued between 1929 and 1961. If the Exclusionary Rule is relaxed so that only wilful invasions of privacy are forbidden, the incentive for a police officer to evade normal search processes–including normal warrant procedure–will increase. Indeed, if the Exclusionary Rule is susceptible of any restriction, it is with respect to searches which are conducted pursuant to warrant since in that situation an objective judiciary has already interposed itself between the citizen and the police. *Cf. Chimel v. California*, 395 U.S. 752, 761 (1969).

3. Whether or not the Exclusionary Rule has a measurable deterrent effect on police officers who would otherwise search without regard to the Constitution, it does–even according to its critics–have advantages for

which there are no ready alternatives. *See, Oaks, supra,* 37 U. Chi. L. Rev. at 756, "The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review [of alleged violations of constitutional rights] and it gives credibility to the constitutional guarantees." This purpose of enforcing the Constitution while preserving judicial integrity underlay the adoption of the Exclusionary Rule (*see, Weeks v. United States,* 232 U.S. 383, 393 (1914), holding that absent judicial enforcement, the Fourth Amendment "might as well be stricken from the Constitution.") and is as much its purpose today. *Mapp v. Ohio,* 367 U.S. 643, 655 (1961); *Terry v. Ohio,* 393 U.S. 1, 12-13 (1968). It is this function of the Exclusionary Rule which would totally vanish with even the "good faith" exception suggested by the Government; federal courts would be in the anomalous position of knowingly authorizing conduct proscribed by the Fourth Amendment. The suggestion that the Exclusionary Rule should be relaxed to prevent "guilty" persons from going free is nothing more or less than the argument that constitutional standards for obtaining evidence are too onerous:

> "If the rule allows unmerited acquittals, it does so only in the cases where the illegality is indispensible to the conviction. An after-the-fact prohibition on use of the evidence prevents convictions in no greater degree than would effective prior direction to police to search only by legal means . . . . [T]he maintenance of existing standards by means of exclusion is not open to attack unless it can be doubted whether the standards themselves are necessary."

Note, "Judicial Control of Illegal Searches," 58 Yale L.J. 144, 161-62 (1944).[25]

Additionally, the suggestion that the admissibility of illegally obtained evidence should turn on the good or bad faith of the arresting officer invites a subjective analysis inappropriate to Fourth Amendment problems. *Chimel v. California*, 395 U.S. 752, 764-75 (1969). There is already an unfortunate leeway in this area in which "good faith" operates: the admissibility of evidence uncovered during a stop-and-frisk depends on whether the officer conducting it was justified, *in the light of his own personal prior experience as a police officer*,[26] in inferring first that the suspect was potentially dangerous, and second that the articles that he extracted during the pat-down were arguably weapons. Especially in this latter

[25]That is the same point made by former California Supreme Court Justice Roger Traynor, in explaining why California judicially adopted the Exclusionary Rule six years prior to this Court's decision in *Mapp v. Ohio*:

"[T]he guilty go free if the evidence necessary to convict could only have been obtained illegally, just as they would go free if such evidence were lacking because the police had observed the constitutional restraints upon them. It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence." Traynor, "*Mapp v. Ohio* At Large In The Fifty States", 1962 Duke L.J. 319, 322 (1962).

[26]"The Court [in *Terry v. Ohio*] accepted with equanimity the testimony of the officer that he merely sensed that the two were up to no good. Noting that the officer had thirty-nine years experience as a policeman, the Court left no doubt that it would honor such experience and expertise in appraising the reasonableness of the conclusions and actions of the officer. 392 U.S. at 5." Cook, "The Art of Frisking", 40 Ford. L. Rev. 789, 790 n.9 (1972).

regard, any experienced police officer could in imaginative good faith believe that a soft bulge in the suspect's pocket was in fact a weapon.[27] And, of course, the fact that the arresting officer was not motivated by malice would be small consolation to the incarcerated victim of an unconstitutional search.

Finally, if the remedy of exclusion is severe, it is because the right protected by that remedy is so precious. As this Court has recently stated in the context of ordering dismissal of an indictment because the petitioner's Sixth Amendment right to a speedy trial was violated, "Indeed . . . it means that a defendant who may be guilty of a serious crime will go free . . . but such severe remedies are not unique in the application of constitutional standards." *Strunk v. United States*, 41 L.W. 4794, 4795 (June 11, 1973) (citation omitted).

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[27]Cook, *supra*, Note 26, at 796-798. The California Supreme Court has condemned this type testimony:

"To permit officers to exceed the scope of a lawful pat-down whenever they feel a soft object by relying upon mere speculation that the object might be a razorblade concealed in a handkerchief . . . or any other atypical weapon would be to hold that possession of any object, including a wallet, invites a plenary search of an individual's person." *People v. Collins*, 1 Cal.3d 658, 463 P.2d 403, 406, 83 Cal. Rptr. 179 (1970) (en banc).

CONCLUSION

For the reasons set forth above, counsel for respondent respectfully submit that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed. Additionally, counsel thank the Court for the privilege of representing respondent in this *in forma pauperis* appeal.

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23 July 1973

COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-936

Supreme Court, U. S.
FILED
AUG 28 1973
MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

WILLIE ROBINSON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 180,000 members, solely dedicated to the defense of those principles safeguarded by the Bill of Rights. During its fifty-three year existence, the ACLU has been concerned with both the Fourth Amendment's protection of personal security and the constitutional imperative of judicial integrity. The issues in this

* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

case go to the heart of both concerns, for the Court is being asked to relax the former and to ignore the latter. For the reasons set forth *infra*, at this point in American constitutional history it is singularly important that the Court reject such arguments.

Summary of Argument

I.

The primary issue in this case is the permissible scope of a search incident to an arrest for a traffic violation. The Government argues broadly that the Fourth Amendment permits a police officer to conduct a full scale search of the person incident to an arrest for a traffic violation. *Amicus* urges that no such search of the person is constitutionally valid. In such circumstances a protective weapons search is the maximum permissible intrusion on individual privacy, and then only if other facts give rise to a reasonable apprehension of danger incident to the custodial arrest for a traffic violation. *Terry* v. *Ohio*, 392 U.S. 1 (1968). In any event, the search here was unreasonable because it exceeded even the permissible limits of a self-protective weapons search. *Chimel* v. *California*, 395 U.S. 752 (1969). Finally, the fact that this search was validated by police department regulations can in no way justify it.

II.

Continued enforcement of Fourth Amendment safeguards requires that the exclusionary rule not be tampered with or modified in any way.

The law enforcement argument is that, in the context of traffic arrests, the exclusionary rule will have no deterrent

effect because police will search whenever they feel the need to, regardless of what this Court says. Completely overlooked is the fact that the exclusionary device also serves a purpose no less important than deterring illegal police conduct, namely, the imperative of judicial integrity. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Elkins* v. *United States*, 364 U.S. 206 (1960). That imperative prohibits judicial complicity in violations of the Fourth Amendment and surrender of judicial responsibility to law enforcement officials. *Johnson* v. *United States*, 333 U.S. 10 (1947). Finally, the alternatives proposed are little more than a plea for reliance on the subjective good faith of law enforcement officials, a standard never accepted by this court. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *United States* v. *United States District Court*, 407 U.S. 297 (1972).

Argument

Introduction

None of the law enforcement briefs filed in this case (as well as in *Gustafson* v. *Florida*, No. 71-1669) mention the following fact: as of 1971, there were almost 113 million motor vehicles registered in the United States, of which almost 93 million were passenger vehicles.[1] These statistics bear an enormous significance for the issues in this case, for they demonstrate that we have become a nation of motorists. And in all probability, the only adversarial encounter that the average citizen will ever have with a policeman will occur when the citizen is behind the wheel of his car and is stopped for violation of a traffic regula-

[1] *Automobile Facts and Figures*, Automobile Manufacturers Association of the United States (1972).

tion. Thus, the powers which the law enforcement officials seek to have conferred in this case have a potential impact on virtually every American.

Moreover, the powers sought are potent ones. The court is being asked to ratify the proposition that a policeman may conduct a full blown search of any motorist whom he arrests for a violation of the traffic laws. And although in this case the requirement that the officer make an actual arrest for the particular traffic offense was mandated by regulation, in many jurisdictions the determination is discretionary with the officer, and the range of traffic offenses for which an arrest can be made is wide. If the government's theories prevail, the decision to arrest in any particular traffic encounter will increasingly turn on whether the policeman wants to conduct a search. The potential for harassment and abuse is obvious. And if the Government's effort to undermine the exclusionary rule also succeeds, even less incentive will remain for the police to honor the Fourth Amendment's safeguards in their encounters with the citizen-motorist.

That is the context in which the constitutional issues in this case must be evaluated.

I.

An arrest for a traffic violation does not, *per se*, justify a full scale search of the person.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, Supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Whatever may have been the confusion surrounding the proper interpretation of the "reasonableness clause" and the "warrant clause," it is now abundantly clear that "the most basic constitutional rule in this area is that '. . . searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'[2] The exceptions are 'jealously drawn,'[3] and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"[4] *Coolidge* v. *New Hampshire,* 403 U.S. 443 at 454-55 (1971). Thus, the starting point for resolving the constitutional

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[2] *Coolidge* v. *New Hampshire,* 403 U.S. at 454-55 quoting from *Katz* v. *United States,* 389 U.S. 347, 357 (1967).

[3] *Coolidge* v. *New Hampshire, supra,* quoting from *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

[4] *Coolidge* v. *New Hampshire, supra,* quoting from *McDonald* v. *United States,* 335 U.S. 451, 456 (1948).

questions posed by this case is that the warrantless search is presumptively unreasonable and that the burden is on the Government to demonstrate that it was "imperative" to search respondent incident to his arrest for a minor traffic violation.

A. *The Fourth Amendment does not permit any search of an individual arrested for a traffic violation absent facts indicating the individual is armed and dangerous.*

Courts have traditionally spoken of the "search incident to an arrest" as an exception to the general proscription of warrantless searches. The Government here seeks to bring this particular variety of searches within that exception. However, a search does not become constitutionally valid simply because it is conducted at the time of an arrest. Rather, it is essential for the Government to establish that the circumstances of the arrest rendered the search "imperative".[5] We submit that no search of respondent at the time of his arrest can be constitutionally justified, because the circumstances of his arrest did not render that course necessary, and the rationale behind the "search incident" exception is not applicable to an arrest for a routine traffic violation.

It is a long established principle, enunciated in numerous decisions of this Court, that a search incident to an arrest is valid only insofar as its purpose is to discover "fruits, implements or evidence" of the crime for which the arrest

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[5] "'A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.'" *Chimel* v. *California*, 395 U.S. 752, 759 (1969), quoting from *Trupiano* v. *United States*, 334 U.S. 699, 708 (1948).

is made or weapons which may be used to effect an escape. See *Weeks* v. *United States*, 234 U.S. 383, 392 (1914); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Preston* v. *United States*, 376 U.S. 364, 367 (1964); *Sibron (Peters)* v. *New York*, 392 U.S. 40, 67 (1968); *Chimel* v. *California*, 395 U.S. 752, 762-63; Note, *Searches of the Person Incident to a Lawful Arrest*, 69 Colum. L. Rev. 866, 868 (1969). The rationale for permitting such a warrantless evidentiary search grows out of the inherent necessities of the situation at the time of the arrest which render such a search reasonable—that is, evidence relevant to the crime may be searched for and seized because it is capable of concealment or destruction before a warrant may be obtained.[6] However, this justification for the conduct of warrantless searches incident to arrest does not obtain in the situation of routine traffic violations. Most arrests for traffic law infractions will not involve fruits, instrumentalities or evidence capable of concealment.[7] In this case, as is conceded, there was no evidentiary basis for the search. There are no fruits of the crimes of driving with a revoked operator's permit and obtaining a new permit by misrepresentation. The only instrumentality of these crimes is the automobile, itself. And when the respondent handed the fraudulently obtained license to the officer, he had secured the only evidence of the crimes for which the arrest was made.

Thus, the only possible basis for a search incident to a traffic arrest is a self-protective search for weapons which may be used to frustrate the arrest and effect an escape. We submit that a self-protective weapons search

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[6] See, e.g., *Chimel* v. *California*, 395 U.S. 752, 763 (1969); *Preston* v. *United States*, 376 U.S. 364, 367 (1964).

[7] See, e.g., *People* v. *Superior Court (Simon)*, 101 Cal. Rptr. 837, 848, 496 P.2d 1205, 1216 (1972) *(en banc)*.

may not be undertaken unless objective facts known to the officer make it reasonable for him to believe that the traffic violator is both armed and dangerous. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). Under the Fourth Amendment the central inquiry in a search conducted of the person of an accused is not whether or when an arrest has taken place, but rather, the reasonableness of the action taken in light of the circumstances. *Terry* v. *Ohio, supra* at 19. In order to assess the reasonableness of an officer's conduct, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry* v. *Ohio, supra*, at 20-21.[8] A self-protective search for weapons, even when characterized as a "frisk," is a substantial intrusion on individual privacy, "which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry* v. *Ohio, supra* at 17. This is no less true when the weapons search follows rather than precedes an arrest.

On the other side of the balance is the law enforcement officer's safety. Yet, despite this very weighty consideration, this Court did not permit a search incident to *every* police-citizen encounter. Rather, in view of the substantial invasion of individual privacy entailed by a search for weapons, this Court struck the balance so as to permit a law enforcement officer to conduct a search only when he can point to objective facts which make it reasonable for

[8] Quoting from *Camara* v. *Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967).

him to conclude that the individual with whom he is dealing is armed and dangerous. *Terry* v. *Ohio, supra* at 27. *Sibron* v. *New York,* 392 U.S. 40, 64 (1968). Our police are in no less of a need to disarm those whom they confront on the street about to perpetrate crimes of violence than they are when undertaking an arrest. Indeed, it is frequently difficult to tell when a street confrontation between a law enforcement officer and a citizen has ripened into an arrest. See *Terry* v. *Ohio, supra* at 13. In short, the risk to the officer is created by the circumstances of the confrontation taken as a whole and not by the technicalities of the law of arrest. The question in either case is whether the officer can reasonably believe that a weapon will be used against him. See *People* v. *Superior Court (Simon), supra* at 1218.

We submit that the mere commission of a traffic violation does not, without more, give rise to a reasonable belief that an individual is armed and dangerous. The vast majority of motorists who commit traffic rule infractions are law abiding citizens. "A motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." *People* v. *Marsh,* 20 N.Y.2d 98, 101, 281 N.Y.S.2d 789, 792, 228 N.E.2d 783, 786 (1967) (Fuld, C.J.). Thus, a warrantless search for weapons incident to an arrest for a traffic infraction should not be permitted absent special facts or circumstances which lead the officer to reasonably conclude that the individual with whom he is dealing is armed and dangerous.*

* In the instant case, no such special facts or circumstances are present. At no time did Officer Jenks even suspect that the re-

Many federal and state courts have reached the result urged here—that no search may be made incident to a traffic violation arrest absent specific facts reasonably suggesting a motorist is armed and dangerous. See, e.g., *United States* v. *Davis*, 441 F.2d 28 (9th Cir. 1971); *People* v. *Superior Court (Simon), supra; People* v. *Marsh, supra.* To hold the contrary, i.e., that an officer may search anyone arrested for any traffic violation, would constitute an "'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile." *People* v. *Superior Court, supra* at 1219. In 1971, there were 112,922,354 motor vehicles registered in the United States of which 92,752,515 were passenger cars. Each year American automobile manufacturers, alone, have total sales of 10,637,738 of which passenger cars account for 8,584,592. *Automobile Facts and Figures,* Automobile Manufacturers Association of the United States (1972). The rule this Court announces in this case will have a very real effect upon each and every driver of these approximately 100 million automobiles, and under the *Chimel* "grabbing distance—confederate" rule, potentially their passengers as well. Every one of these millions of individuals would be subject to search in the discretion of a police officer. If the police are permitted to routinely search

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spondent might possess a weapon. At no time did he believe himself in danger nor did he articulate any facts which would have made such a fear reasonable. There is no indication that respondent was anything but cooperative during the course of any of his encounters with Officer Jenks. In fact, Officer Jenks indicated that he had no particular purpose in searching respondent. He just searched him and didn't think about what he was looking for. Whatever merit there may be in arguing for a rule which permits a protective search incident to an arrest for a traffic infraction, such an argument would certainly not apply to the facts of this case.

all those they arrested for motor vehicle regulation infractions, the police would be encouraged to make custodial arrests rather than to merely issue citations or summonses.

Although in this case a custodial arrest was required by regulation, in most instances the choice will repose in the police officer, and a holding that police may summarily search all traffic law violators will promote the potential abuse of that discretion. When added to the generally held police power to routinely stop and question all motorists for license and registration spot checks, the assault upon Fourth Amendment rights looms as an omnipresent potential. Indeed, the "warrant requirement" of the Fourth Amendment would become for all time the exception rather than the rule. The invasion on privacy would be substantial —First, the interference with individual liberty involved in the routine stop; second, the arrest and the ensuing greater invasion into individual freedom of movement resulting therefrom; and third, the search itself. To permit the search of anyone arrested for a traffic violation puts the Fourth Amendment rights of every citizen in the hands of the police. Under such a view, the businessman who inadvertently leaves his registration or license at home, and the fleeing felon who "runs" a series of stop signs are equally subject to arrest and search. The Fourth Amendment does not permit such a result. In this situation the only constitutionally reasonable warrantless search is that which is necessary and the only search which is necessary is that of an arrestee who may reasonably be believed to be armed and dangerous. Absent special factors or circumstances, the ordinary traffic violator who is cooperative at all stages of the encounter, who will not be held in jail detention, is not such a person.

B. *The search in this case cannot be justified as a valid self-protective weapons search.*

Even if a protective weapons search was reasonable incident to the respondent's arrest for a traffic offense, the search of respondent was unconstitutionally broader than a permissible weapons search. A search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable scope and intensity. *Terry* v. *Ohio*, 392 U.S. 1, 17-18 (1968); see *Chimel* v. *California, supra*. The only constitutionally acceptable search is that which is "'strictly tied to and justified by'" the circumstances which rendered its initiation permissible. *Terry* v. *Ohio, supra*, at 19. The only object which may be justifiably searched for incident to an arrest for a traffic offense is a weapon which may be used to attack the officer and effect an escape. Only the safety of the officer justifies the initiation of the search and all that is permitted is that which will provide for the officer's safety.

Amicus submits that in removing the crumpled cigarette package from respondent's pocket and in opening that package and searching its contents, Officer Jenks exceeded the scope of a properly circumscribed protective weapons search. The decision of this Court in *Peters* v. *New York*, 392 U.S. 40 fixes the outer boundaries of the constitutional scope of a search incident to an arrest. A police officer searching the person of an arrestee is not entitled to "engage in an unrestrained and thorough going examination" of the arrestee's person and his personal effects. *Sibron* v. *New York, supra* at 67. Rather, according to *Peters*, he is permitted, first, only to pat down the individual, and then to invade his privacy only when he feels an object capable of being used as a weapon.

In this case, Officer Jenks never believed the crumpled cigarette package was a weapon. At best, one could say he did not know what it was, but at no time did he feel himself in danger of attack. A protective weapons frisk of the kind approved in *Terry* v. *Ohio, supra* was sufficient to establish that respondent was unarmed. To reach into respondent's pocket, to seize the cigarette package, and to open it and to search its contents was to allow the search to degenerate into an unreasonable, unrestrained, indiscriminate search of respondent and his possessions which bore no relation to the circumstances which justified it at its inception.

The law enforcement briefs argue that the protection of the officer requires that he conduct a full scale search incident to any arrest, even for a traffic infraction. However, this argument ignores the other half of the balance required of Fourth Amendment analysis—the interests of the individual in preserving his personal privacy. The question is not so much how much safety does the police officer require, but rather, how much privacy must be sacrificed to secure that safety. See *Terry* v. *Ohio, supra* at 24-25. Even a "frisk" for weapons is a significant intrusion on individual privacy. It is suggested that reaching into respondent's pockets and searching the cigarette package did not constitute a significant increment in the invasion of privacy. However, that final increment, like the proverbial straw, followed an initial "routine" stop, a subsequent investigative stop, an arrest, a search, and finally a search and seizure of the cigarette package. In short, the petitioner had yielded a substantial amount of privacy to the

police, and the police, in turn, had achieved only the most minimal increase in their safety.[10]

Indeed, total protection cannot be achieved absent conceding the power to "strip search" every motorist arrested for a traffic violation. Granting the police the power to conduct a "full-field search," ignoring the substantial invasion of privacy that will ensue, will achieve something less than absolute protection.[11]

Moreover, in arguing that a "full-field search" incident to every arrest for a traffic violation should be permitted, law enforcement officials are asking this Court to engage in the assumptions first, that every traffic violator is armed; second, that every traffic violator who is armed will use his weapon; and third, that every traffic violator will so conceal his weapon that a "pat down" search will fail to discover it. To permit such categorical, generalized assump-

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[10] There is "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Chimel* v. *California*, 395 U.S. 752, 767 n. 12 (1969).

[11] We do not minimize the tragic fact that many police officers are slain in the line of duty. We do question, however, the conclusion that this fact compels the surrender of Fourth Amendment rights. In relation to the number of stops made for traffic infractions, the number of incidents of violence in the course of such stops is very small. In addition, most assaults on police officers will occur immediately upon the officer approaching the automobile, before the officer would even have the opportunity to search. Granting the police the broad power to conduct a "full-field search" will not add to the protection provided police officers.

It is important to note that the highest courts in the nation's two largest states have rejected the claims that the police advance here. See *People* v. *Superior Court (Simon) supra; People* v. *Marsh, supra;* see also, *People* v. *Adams*, —— N.Y.2d ——, 13 Cr. L. Rep. 2239 (1973).

tions is to ignore the "demand for specificity in the information upon which police action is predicated" which "is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio, supra* at 21 n. 18. To engage in such generalized assumptions is to "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry* v. *Ohio, supra* at 22. These assumptions are not the sort of "specific reasonable inferences" which an officer is entitled to draw from the mere fact of a traffic violation. *Terry* v. *Ohio, supra* at 27. See also, *People* v. *Superior Court (Simon), supra* at 1219.

If only a self-protective search for weapons is permissible incident to an arrest for a traffic infraction, then the issue comes down to the proper scope of such a weapons search. And that issue is controlled by this Court's decision in *Peters* v. *New York (Sibron* v. *New York)*, 392 U.S. 40 (1968). First, the officer must conduct a pat down. He is justified in intruding further only after discovering an object which might reasonably be believed to be a weapon. If this were not the rule, then, in fact, there is no difference between a search just for weapons and a search for evidence and weapons. That is, a weapons search would be just a thoroughgoing, unrestrained, general search of the person and his possessions because almost any object can be "unidentified" or "unidentifiable" when merely felt through the outer clothing. Wallets, key cases, pens and the like which are commonly carried on the person will subject the individual to the further intrusion of their seizure and search. Whatever might be said in regard to other cases, in this case the officer did not believe that the cigarette package respondent carried was a weapon when he seized it.

Because of the potential for abuse, the lower federal courts have been careful to confine weapons searches to their proper scope. They have consistently held invalid searches which have extended beyond the person of the suspect. See, e.g., *United States* v. *Day*, 455 F.2d 454 (3d Cir. 1972); *United States* v. *Collins*, 439 F.2d 610 (D.C. Cir. 1971); *United States* v. *Hostetter*, 295 F. Supp. 1312 (D. Del. 1969). They have invalidated searches of objects removed from the person of the arrestee because adequate protection is provided by placing the object out of the arrestee's reach. See, e.g., *United States* v. *Collins, supra* at 618, *United States* v. *Day, supra*. Even where the search has been confined to the person of the suspect, lower courts have carefully scrutinized the scope of the search and held unlawful those which were impermissibly broad. In *Tinney* v. *Wilson*, 408 F.2d 912 (9th Cir. 1969), a valid search became unconstitutional when upon feeling a small object, the officer squeezed it to ascertain its nature. See also, *United States* v. *Del Toro*, 464 F.2d 520 (2d Cir. 1972).

We submit, therefore, that the search here exceeded the only object which justified its inception—a protective search—and is thereby unreasonable.

C. *That the search was undertaken pursuant to routine police procedures does not legitimate an otherwise unconstitutional search.*

The Fourth Amendment commands that the search of any individual must be undertaken pursuant to specific and articulatable facts and not official, general prejudgments embodied in routine procedures. *Terry* v. *Ohio, supra* at 21, n. 18. Moreover, the Fourth Amendment commands that the determination of whether a search is justified is to

be made by a neutral magistrate and not the police. See *Johnson* v. *United States*, 333 U.S. 10 (1947). To hold that an otherwise unlawful search is reasonable because it was undertaken pursuant to routine police procedures is to vest sole responsibility for upholding Fourth Amendment rights in the police and to abdicate judicial responsibility for enforcing constitutional rights. The Metropolitan Police Department cannot authorize its individual members to break the law.

The lower Federal courts have been steadfast in their refusal to sanction searches just because undertaken pursuant to routine procedures. See, e.g., *United States* v. *Davis, supra*. The mere recitation of the words "routine police procedures" do not exempt police activity from the restrictions imposed by the Fourth Amendment. If police regulation can prescribe unconstitutional action, it can just as easily prescribe only constitutional action.

II.

Continued enforcement of the exclusionary rule is essential to preserve the Fourth Amendment's safeguard against police intrusion upon the security of the citizen and the constitutional imperative of judicial integrity.

Once again, law enforcement officials mount their attack [illegible] rule, as though its elimination or [illegible] would dramatically alleviate the problem of crime in America. The argument runs as follows: (1) the rule does not deter police misconduct, if the police really want to search a person, they will go ahead and do so; (2) the rule only benefits the criminal, allowing the guilty to go free as a consequence of the constable's blunder, (3) therefore, at the very least, the rule should be modified and made applicable only to "serious abuses" of the Fourth Amendment. Virtually ignored in the argument is the other purpose of the rule—the imperative of judicial integrity. Achieving that purpose alone is sufficient justification for continued and unswerving application of the rule.

A. *The imperative of judicial integrity.*

The Government directs its attack upon the exclusionary rule to the issue of deterrence, deliberately failing to acknowledge that this Court is being asked to participate in and sanction prosecutorial deprivation of constitutional liberties. To find, on the one hand, that the state has violated a defendant's Fourth Amendment rights in obtaining evidence against him, and then to find, on the other hand, that his conviction based upon such evidence has been obtained consistent with the requirements of due process

of law is unacceptable logic. Particularly at this point in our constitutional history this Court should not lend its offices to such use of illegally seized evidence.

In *Weeks* v. *United States*, 234 U.S. 383 (1914) and again in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court unequivocably found that the exclusionary rule is constitutionally required and implicit in the Fourth Amendment. In this case the Court is being asked not just to overrule *Mapp*, but to overrule *Weeks* as well. As was stated in *Weeks* v. *United States*, *supra* at 393, the Fourth Amendment would hardly be worthy of inclusion in our Constitution absent the exclusionary rule.[11] In the 60 years since the decision in *Weeks*, this Court has not departed from the essential core of that case: that the exclusionary rule is constitutionally required. See *Elkins* v. *United States*, 364 U.S. 206, 208, 210; *Mapp* v. *Ohio*, 367 U.S. 643.[12]

Moreover, the exclusionary rule of the Fourth Amendment is similar to principles underlying enforcement of the Fifth. This Court has repeatedly noted the close connection between the two. In *Mapp* v. *Ohio*, *supra*, this Court stated:

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[11] "If letters and private documents must be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as others thus placed are concerned, might as well be stricken from the Constitution."

[12] The opinion in *Mapp* v. *Ohio* repeatedly stresses the constitutional character of the exclusionary rule. There the court stated: "this Court has . . . required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" (Quoting from Holmes, J., *Silverthorn Lumber Co.* v. *United States*, 251 U.S. 385, 392), 367 U.S. at 648.

> And nothing could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence are overridden' without regard to 'the incidence of such conduct by the police,' slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc. We find that as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle.' . . . They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' *Mapp* v. *Ohio, supra* at 656-57 (footnotes and citations omitted).

And, as Justice Black stated:

> when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compulsory self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule. *Mapp* v. *Ohio, supra* at 662 (concurring opinion).

Thus, the exclusionary rule is constitutionally required as part and parcel of the right of privacy guaranteed by the Fourth Amendment and by the Fourth taken together with the Fifth Amendment.[14]

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[14] The Government's argument that some lower courts have only required substantial but not formal compliance with the warnings

And the enforcement of these provisions by use of the exclusionary device is compelled not only by the need to preserve those constitutional protections, but also by what has been described as the "imperative of judicial integrity." *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). When this Court permits the introduction of unconstitutionally seized evidence, it sanctions the illegal conduct which produced it. Were this Court to reverse itself and permit the introduction of evidence illegally seized in this case, it would appear to bestow approval on unlawful police conduct.

But, it is argued, permitting the criminal to go free because the police officer erred is too drastic and costly a remedy for Fourth Amendment violations. However, Justice Clark answered this argument over a decade ago:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. *Mapp* v. *Ohio, supra,* at 659.

We submit that the choice between the competing demands of individual privacy and law enforcement is foreclosed to this Court. The men who authored the Fourth Amend-

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set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) misses the mark. *Miranda* warnings are a tool, albeit an important one, for insuring that a confession is truly voluntary and therefore that its admission into evidence does not offend the constitutional privilege. The warnings are but a part of the determination that police conduct has violated the Fifth Amendment. Here, however, the determination that a constitutional violation has occurred has already been made prior to and independently of the question of remedy. The real issue is what courts should do in the face of police conduct which directly, not secondarily, violates a constitutional safeguard.

ment made the choice—they determined that American society has more to fear from governmental misconduct than from individual violations of law. As Justice Brandeis stated:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

It is the government's duty to uphold the law not violate it. And the judiciary as part of the government has a special duty to scrupulously guard against official lawlessness. *Weeks* v. *United States,* 234 U.S. at 391-92.

The Fourth Amendment requires that the judiciary, not the police, determine the permissibility of any invasion of individual privacy. In effect the law enforcement officials are arguing for the abdication of the constitutionally required judicial responsibility for interpreting the Fourth Amendment by claiming that the policeman in the field should be the final arbiter of any individual's constitutional rights. However, this argument misses the point of the Fourth Amendment. The warrant clause is not without meaning simply because the search in the instant case was undertaken without a warrant. Rather, the warrant clause means that the police officer in the field has no greater

power to undertake a search than a magistrate has to authorize one if he were at the officer's elbow. The Government's argument here is precisely the opposite, for it is contended that the police officer has the power to undertake a search that a neutral magistrate could not authorize. This argument was answered over a quarter of a century ago by Justice Jackson:

> When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent. *Johnson* v. *United States*, 333 U.S. 10, 14 (1947).

That a search was undertaken without a warrant does not alter the role of the judiciary in determining the propriety of a search. If a search is found to be unreasonable, it is the duty of the Court to put the victim of the search in the position he would be in had the search not been conducted.[15] It is almost too familiar to bear repeating that a search may not be justified by what it uncovers. Yet the argument here, if accepted, would achieve precisely that prohibited result.

B. *Deterrence of illegal police conduct.*

Reduced to its essentials, the law enforcement argument is that the exclusionary rule will not prevent police from

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[15] This principle distinguishes the harmless error cases which the Government relies on. In those cases, the constitutional error played no role in the defendant's conviction, and the government was placed in the same position it would have been in had it not sought to use redundant evidence. Here, by contrast, the illegally-seized evidence is almost always the entire basis for the prosecution's case. Such evidence can rarely be characterized as "harmless," and certainly never harmless beyond a reasonable doubt.

conducting any particular search felt to be necessary. Even assuming the factual validity of a proposition which runs contrary to decades of judicial experience, it is an unseemly premise upon which to base constitutional doctrine.

It is important to recognize at the outset that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice apparatus. Thus the exclusionary rule is not truly a sanction directed at the individual police officer, either by its terms or by its effect, hence the absence of any terms placing "blame" on the police officer. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the magistrate, to the prosecutor, to the trial judge. Without sanctions such as the exclusionary rule, court pronouncements on the meaning of the Fourth Amendment will fall on deaf ears as they did prior to *Mapp*. See, J. Skolnick, JUSTICE WITHOUT TRIAL, 219-220 (1966). Any failings of the exclusionary rule to date can, in large part, be ascribed to shortcomings in the translation of judicially articulated values to police work values. See, Le Fave & Remington, *Controlling the Police: the Judge's role in making and reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987 (1965).

One solution is for prosecution and police officials to educate the police officer on the beat as to his constitutional obligations. Much has been accomplished in the last six years. Since the President's Commission on Law Enforcement and Administration of Justice proposed in 1967 that all police departments employ full or part-time legal advisers (The Challenge of Crime in a Free Society, 114), over 100 metropolitan police departments have established

such positions. One function for these advisers, only recently coming into vogue, has been to make rules for police conduct in typical, on-the-street situations. Police training manuals have likewise undergone substantial revisions with new emphasis being placed on constitutional and statutory obligations in police work. Progressive departments are encouraging their officers to take on new training and education programs which, among other things, sensitize police officers to the mandates of the Constitution.

Indeed, in the very jurisdiction from which this case arose, the police have experimented with an even more far-reaching mechanism for the legal education of their officers, described by Chief Jerry Wilson and Department General Counsel Geoffrey Alprin:

> In the District, we have recently begun an experiment for surfacing, for the benefit of higher officials in the Department, those non-prosecuted cases which before have never reached the attention of the courts and seldom have been reviewed within the Department. In cooperation with the local United States Attorney's Office, the Department has created a specialized unit, staffed with police officials, with responsibility for reviewing every case which is dropped by the prosecutor, for whatever reason. Errors in police procedures, whether of exclusionary rule character or not, are brought to the attention of the offending officer and his commanding official, who is required to insure that the officer is counselled and instructed in proper processes. The Case Review Section maintains records by officer and unit so that recurrent patterns of misconduct or procedural error can be observed and cor-

rected. In those areas where direct Department orders apply, as, for example, the identification of automobile search orders, egregious or repetitive errors may be dealt with through the Department's disciplinary processes. To offset particularly significant patterns adversely affecting prosecution of cases, members of the Section regularly instruct recruit and in-service training classes at the Department's Academy. Statistics are maintained by the Section and are available to the public. J. Wilson and G. Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 Law & Contemp. Prob. 488, 498-99 (1971).

Such examples of the rising degree of professionalism in police departments around the country should increase the likelihood that judicial pronouncements will be obeyed. And the exclusionary rule has played an important role both in initiating the trend and in maintaining it. What the description of Wilson and Alprin tells us is that the better-run police departments in this country place a very high value indeed on conviction rates. The Case Review Section was born out of a desire to reduce the "no paper" or no court action rate of the prosecutor's office, estimated by the authors at better than twenty per cent, a substantial portion of which results from exclusionary rule violations. We believe that the exclusionary rule is largely responsible for bringing police departments out of the era of the third degree, that police departments are becoming increasingly sensitive to constitutional limitations as they affect conviction rates (and not out of any new-found altruism), and that future refinement of police procedures is largely dependent on retention of the exclusionary rule and the addi-

tion of affirmative sanctions and remedies for gross forms of police negligence and willful misconduct.[10]

In fact, the police regulation practice involved in this case is an example of the increasing likelihood of police adherence to constitutionally required procedures. As the metropolitan police force has attempted to issue guidelines to regulate the conduct of the police officer in the field, there is a greater likelihood that decisions of this Court will be communicated to the individual police officer. If Officer Jenks could conform his conduct to an unconstitutional departmental regulation, it is just as easy for him to conform his conduct to departmental regulations which incorporate constitutional standards.

There is simply no reason why constitutional safeguards and effective law enforcement cannot coexist. As the late J. Edgar Hoover, certainly no critic of law enforcement prerogatives, put it:

> One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism. *FBI Law Enforcement Bulletin*,

[10] Indeed, last year the law enforcement argument against the exclusionary rule was that by virtue of this increased professionalism, the rule was no longer necessary; the police would police themselves.

September, 1952, pp. 1-2, as quoted in *Elkins* v. *United States*, 364 U.S. 206, 218-19 n. 8 (1960).

This court should follow that counsel. The only truly effective police department is the department which obeys the law. If the lawbreaker goes free it is not because the law is in error, but rather because the police failed to abide by the law. This Court should reaffirm its adherence to the exclusionary rule which "gives, to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp* v. *Ohio, supra* at 660.

C. *The proposed alternatives.*

As alternatives to the inadmissibility of illegally seized evidence, the law enforcement officials suggest adoption of a "substantial violation" balancing test, composed of a number of factors which would be consulted to determine if the policeman's admittedly unconstitutional conduct was sufficiently egregious to warrant the exclusionary sanction. These proposals, for the first time, introduce subjective elements into Fourth Amendment jurisprudence, a kind of "shocks the conscience" approach which was rejected in *Mapp*. Indeed, such a test was rejected even by a Court which purported to follow the "old" due process test. Justice Jackson had this to say about the "substantial violation" test urged here:

> We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock

> is more serious, the states must exclude the evidence or we will reverse the conviction. . . . We think . . . that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground. *Irvine* v. *California*, 347 U.S. 128, 133-34 (1954).

If the law regarding search and seizure is indefinite now, and deterrence is impossible because the police officer on the beat cannot know what conduct is prohibited, the officer will be more confused under petitioner's "substantial violation" test. Deterrence will then be rendered hopeless. If the substantive law of the Fourth Amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what "substantial violation" means. Courts will be asking themselves whether the police officer conducted a "reasonable or unreasonable" unreasonable search. It is difficult to imagine a rule which would cause greater confusion to the average police officer.

In effect, what petitioner and *amici* urge is that every individual's Fourth Amendment rights will be determined by the police officer on the beat subject only to his good faith. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Terry* v. *Ohio*, *supra* at 22 (quoting from *Beck* v.

Ohio, 379 U.S. 89, 97). The good faith of a police officer in conducting a search is difficult to measure and such a subjective test will turn a defendant's trial into the trial of the police officer. The whole instinct of the Court's Fourth Amendment jurisprudence is opposed to such reliance on the good faith of law enforcement officials to respect the citizen's right to privacy. See, e.g., *United States* v. *United States District Court*, 407 U.S. 297 (1972).

In this case, the government is proposing a seemingly circumscribed and reasonable alteration of the exclusionary rule. A century ago this Court warned against such slight and well-intentioned incursions on constitutional safeguards:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure . . . . It is the duty of courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachment thereon. *Boyd* v. *United States*, 116 U.S. 616, 635 (1886).

And just recently, Chief Judge Kaufman of the Second Circuit reminded us of the same principles:

> We often speak of governmental interests as opposed to individual rights. We should realize, however, that it is the government's principal duty to safeguard individual liberties if it is to continue to serve the people well.

Of course, we all suffer when, in Cardozo's classic phrase, the criminal goes free because the constable has blundered. *People* v. *DeFore*, 242 N.Y. 13, 21 (1926). The remedy however is to help the constable not to blunder. The problem of crime, particularly the diabolical crimes charged in the indictment here, is of great concern to us. But if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end. *United States* v. *Huss*, —— F.2d —— (2d Cir., No. 73-1920, June 26, 1973), *Slip op.* at 4467-68.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 1973

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* Attorneys for *amicus* wish to express their appreciation to Helene Freeman, a third-year student at New York University Law School, for her assistance in the preparation of this brief.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ROBINSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-936. Argued October 9, 1973—Decided December 11, 1973

Having, as a result of a previous check of respondent's operator's permit, probable cause to arrest respondent for driving while his license was revoked, a police officer made a full-custody arrest of respondent for such offense. In accordance with prescribed procedures, the officer made a search of respondent's person, in the course of which he found in an inside coat pocket a cigarette package containing heroin. The heroin was admitted into evidence at the District Court trial, which resulted in respondent's conviction for a drug offense. The Court of Appeals reversed on the ground that the heroin had been obtained as a result of a search in violation of the Fourth Amendment. *Held:* In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment. Pp. 5–18.

(a) A search incident to a valid arrest is not limited to a frisk of the suspect's outer clothing and removal of such weapons as the arresting officer may, as a result of such frisk, reasonably believe the suspect has in his possession, and the absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the standards applicable to such a search. *Terry* v. *Ohio*, 392 U. S. 1, distinguished. Pp. 8–11; 15–16.

(b) A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment and requires no additional justification, such as the probability in a particular arrest situation that weapons or evidence would in fact be found upon the suspect's person; and whether or not there was present one of the reasons supporting the authority for a search of the

person incident to a lawful arrest need not be litigated in each case. Pp. 16–17.

(c) Since the custodial arrest here gave rise to the authority to search, it is immaterial that the arresting officer did not fear the respondent or suspect that he was armed. Pp. 17–18.

— U. S. App. D. C. —, 471 F. 2d 1062, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-936

United States, Petitioner,
v.
Willie Robinson, Jr.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December 11, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Robinson was convicted in United States District Court for the District of Columbia of the possession and facilitation of concealment of heroin in violation of 26 U. S. C. § 4704 (a) (1964 ed.), and 21 U. S. C. § 174 (1964 ed.). He was sentenced to concurrent terms of imprisonment for these offenses. On his appeal to the Court of Appeals for the District of Columbia Circuit, that court first remanded the case to the District Court for evidentiary hearing concerning the scope of the search of respondent's person which had occurred at the time of his arrest. *United States* v. *Robinson*, — U. S. App. D. C. —, 447 F. 2d 1215 (1971). The District Court made findings of fact and conclusions of law adverse to respondent, and he again appealed. This time the Court of Appeals *en banc* reversed the judgment of conviction, holding that the heroin introduced in evidence against respondent had been obtained as a result of a search which violated the Fourth Amendment to the United States Constitution. *United States* v. *Robinson*, — U. S. App. D. C. —, 471 F. 2d 1082 (1972). We granted certiorari, 410 U. S. 982 (1973), and set the case

for argument together with *Gustafson v. Florida*, No. 71-1669, — U. S. —, *post*, at —, also decided today.

On April 23, 1968, at approximately 11 o'clock p. m., Officer Richard Jenks, a 15-year veteran of the District of Columbia Metropolitan Police Department, observed the respondent driving a 1965 Cadillac near the intersection of 8th and C Streets, Southeast, in the District of Columbia. Jenks, as a result of previous investigation following a check of respondent's operator's permit four days earlier, determined there was reason to believe that respondent was operating a motor vehicle after the revocation of his operator's permit. This is an offense defined by statute in the District of Columbia which carries a mandatory minimum jail term, a mandatory minimum fine, or both. 40 D. C. Code § 302 (d).

Jenks signaled respondent to stop the automobile, which respondent did, and all three of the occupants emerged from the car. At that point Jenks informed respondent that he was under arrest for "operating after revocation and obtaining a permit by misrepresentation." It was assumed by the majority of the Court of Appeals, and is conceded by the respondent here, that Jenks had probable cause to arrest respondent, and that he effected a full custody arrest.[1]

[1] The Court of Appeals noted that there was a difference in the presentation of the facts in the various proceedings that were conducted in the District Court. Counsel for respondent on appeal stressed that respondent had a record of two prior narcotics convictions, and suggested that Officer Jenks may have been aware of that record through his investigation of criminal records, while Jenks was checking out the discrepancies in the birthdates on the operator's permit and on the selective service card that had been given to him for examination when he had confronted the respondent on the previous occasion. Respondent argued below that Jenks may have used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral

In accordance with procedures prescribed in Police Department instructions,[2] Jenks then began to search respondent. He explained at a subsequent hearing that

magistrate had Jenks sought a warrant. The Court of Appeals found that Jenks had denied he had any such motive, and for the purposes of its opinion accepted the government's version of that factual question, since even accepting that version it still found the search involved to be unconstitutional. 471 F. 2d, at 1088 n. 3. We think it is sufficient for purposes of our decision that respondent was lawfully arrested for an offense, and that Jenks' placing him in custody following that arrest was not a departure from established police department practice. See n. 2, *infra*. We leave for another day questions which would arise on facts different from these.

[2] The government introduced testimony at the evidentiary hearing upon the original remand by the Court of Appeals as to certain standard operating procedures of the Metropolitan Police Department. Sergeant Dennis C. Donaldson, a Metropolitan Police Department Training Division Instructor, testified that when a police officer makes "a full custody arrest" which he defined as where an officer "would arrest a subject and subsequently transport him to a police facility for booking," the officer is trained to make a full "field type search":

"Q. Would you describe the physical acts the officer is instructed to perform with respect to this field search in a full custody arrest situation?

"A. (Sgt. Donaldson). Basically, it is a thorough search of the individual. We would expect in a field search that the officer completely search the individual and inspect areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes. Those are the areas we would ask a complete thorough search of.

"Q. What are the instructions in a field type search situation when an officer feels something on the outside of the garment?

"A. If it is a full custody arrest and he is conducting a field search, we expect him to remove anything and examine it to determine exactly what it is.

"THE COURT: That is a full custody arrest. What is the last part of it?

"THE WITNESS: In conducting a field search, which is done any

he was "face to face" with the respondent, and "placed [his] hands on [the respondent], my right hand to his left breast like this (demonstrating) and proceeded to pat him down thus (with the right hand)." During this patdown, Jenks felt an object in the left breast pocket of the heavy coat respondent was wearing, but testified that he "couldn't tell what it was" and also that he "couldn't actually tell the size of it." Jenks then reached into the pocket and pulled out the object, which

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time there is a full custody arrest, we expect the officer to examine anything he might find on the subject.

"THE COURT: Would he do the same thing in a pat-down search?

"THE WITNESS: If he could determine in his pat-down or frisk by squeezing that it was not, in fact, a weapon that could be used against him, then we don't instruct him to go further.

"THE COURT: But in a field search, even though he may feel something that he believes is not a weapon, is he instructed to take it out?

"THE WITNESS: Yes, sir."

Sergeant Donaldson testified that officers are instructed to examine the "contents of all of the pockets" of the arrestee in the course of the field search. It was stated that these standard operating procedures were initiated by the police department "primarily, for [the officer's] own safety and secondly, for the safety of the individual he has placed under arrest and, thirdly, to search for evidence of the crime." While the officer is instructed to make a full field search of the person of the individual he arrests, he is instructed, and police department regulations provide, that in the case of a full custody arrest for driving after revocation, "areas beyond [the arrestee's] immediate control should not be searched because there is no probable cause to believe that the vehicle contains fruits, instrumentalities, contraband or evidence of the offense of driving after revocation." Those regulations also provide that in the case of some traffic offenses, including the crime of operating a motor vehicle after revocation of an operator's permit, the officer shall make a summary arrest of the violator and take the violator, in custody, to the stationhouse for booking. D. C. Metropolitan Police Department General Order No. 3, series 1959 (April 24, 1959).

Such operating procedures are not, of course, determinative of the constitutional issues presented by this case.

turned out to be a "crumpled up cigarette package." Jenks testified that at this point he still did not know what was in the package:

> "As I felt the package I could feel objects in the package but I couldn't tell what they were . . . . I knew they weren't cigarettes."

The officer then opened the cigarette pack and found 14 gelatin capsules of white powder which he thought to be, and which later analysis proved to be, heroin. Jenks then continued his search of respondent to completion, feeling around his waist and trouser legs, and examining the remaining pockets. The heroin seized from the respondent was admitted into evidence at the trial which resulted in his conviction in the District Court.

The opinion for the plurality judges of the Court of Appeals, written by Judge Wright, the concurring opinion of Chief Judge Bazelon, and the opinion for the dissenting judges, written by Judge Wilkey, gave careful and comprehensive treatment to the authority of a police officer to search the person of one who has been validly arrested and taken into custody. We conclude that the search conducted by Jenks in this case did not offend the limits imposed by the Fourth Amendment, and we therefore reverse the judgment of the Court of Appeals.

I

It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.

Examination of this Court's decisions in the area show that these two propositions have been treated quite differently. The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case. The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched.

Because the rule requiring exclusion of evidence obtained in violation of the Fourth Amendment was first enunciated in *Weeks* v. *United States*, 232 U. S. 383 (1914), it is understandable that virtually all of this Court's search and seizure law has been developed since that time. In *Weeks*, the Court made clear its recognition of the validity of a search incident to a lawful arrest:

> "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, Criminal Plead. and Practice, 8th ed., § 60; *Dillon* v. *O'Brien and Davis*, 16 Cox C. C. 245." 232 U. S., at 392.

Agnello v. *United States*, 269 U. S. 20 (1925), decided 11 years after *Weeks*, repeats the categorical recognition of the validity of a search incident to lawful arrest:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the

arrest is made in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted." *Id.*, at 30.

Throughout the series of cases in which the Court has addressed the second proposition relating to a search incident to a lawful arrest—the permissible area beyond the person of the arrestee which such a search may cover—no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee. *E. g., Carroll* v. *United States*, 267 U. S. 132 (1925); *Marron* v. *United States*, 275 U. S. 192 (1927); *Go-Bart Co.* v. *United States*, 282 U. S. 344 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452 (1932); *Harris* v. *United States*, 331 U. S. 145 (1947); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *United States* v. *Rabinowitz*, 339 U. S. 56 (1950); *Preston* v. *United States*, 376 U. S. 364 (1964); *Chimel* v. *California*, 395 U. S. 752 (1969). In *Chimel*, where the Court overruled *Rabinowitz* and *Harris* as to the area of permissible search incident to a lawful arrest, full recognition was again given to the authority to search the person of the arrestee:

"When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 395 U. S., at 762–763.

Three years after the decision in *Chimel*, *supra*, we upheld the validity of a search in which heroin had been

taken from the person of the defendant after his arrest on a weapons charge, in *Adams v. Williams*, 407 U. S. 143 (1972), saying:

"Under the circumstances surrounding Williams' possession of the gun seized by Sergeant Connolly, the arrest on the weapons charge was supported by probable cause, and the search of his person and of the car incident to that arrest was lawful." *Id.*, at 149.

Last Term in *Cupp v. Murphy*, 412 U. S. 291, 295 (1973), we again reaffirmed the traditional statement of the authority to search incident to a valid arrest.

Thus the broadly stated rule, and the reasons for it, have been repeatedly affirmed in the decisions of this Court since *Weeks v. United States* nearly 60 years ago. Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.

II

In its decision of this case, the majority of the Court of Appeals decided that even after a police officer lawfully places a suspect under arrest for the purpose of taking him into custody, he may not ordinarily proceed to fully search the prisoner. He must instead conduct a limited frisk of the outer clothing and remove such weapons that he may, as a result of that limited frisk, reasonably believe the suspect has in his possession. While recognizing that *Terry v. Ohio*, 392 U. S. 1 (1968), dealt with a permissible "frisk" incident to an investigative stop based on less than probable cause to arrest, the Court of Appeals felt that the principles of that case should be carried over to this probable cause arrest for

driving while one's license is revoked. Since there would be no further evidence of such a crime to be obtained in a search of the arrestee, the Court held that only a search for weapons could be justified.

Terry v. *Ohio*, *supra*, did not involve an arrest for probable cause, and it made quite clear that the "protective frisk" for weapons which it approved might be conducted without probable cause. 392 U. S., at 21–22, 24–25. The Court's opinion explicitly recognized that there is a "distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons":

> "The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States*, 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search even though it remains a serious intrusion.
>
> ". . . An arrest is a wholly different type of intrusion upon the individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in hav-

ing its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." 392 U. S., at 25-26 (footnote omitted).

Terry, therefore, affords no basis to carry over to a probable cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause.

The Court of Appeals also relied on language in *Peters* v. *New York*, 392 U. S., at 66, a companion case to *Terry*. There the Court held that the police officer had authority to search Peters because he had probable cause to arrest him, and went on to say:

". . . the incident search was obviously justified by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.' *Preston* v. *United States*, 376 U. S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Laskey did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects." 392 U. S., at 67.

It is of course possible to read the second sentence from this quotation as imposing a novel limitation on the established doctrine set forth in the first sentence. It is also possible to read it as did Mr. Justice Harlan in his concurring opinion:

"The second possible source of confusion is the Court's statement that Officer Laskey did not engage

in an unrestrained and thorough-going examination of Peters and his personal effects. *Ante*, at 67. Since the Court found probable cause to arrest Peters, and since an officer arresting on probable cause is entitled to make a very full incident search, I assume that this is merely a factual observation. As a factual matter, I agree with it." 392 U. S., at 77 (footnote omitted).

We do not believe that the Court in *Peters* intended in one unexplained and unelaborated sentence to impose a novel and far reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest. While the language from *Peters* was quoted with approval in *Chimel* v. *California*, *supra*, 395 U. S., at 764, it is preceded by a full exposition of the traditional and unqualified authority of the arresting officer to search the arrestee's person, 395 U. S., at 763. We do not believe that either *Terry* or *Peters*, when considered in the light of the previously discussed statements of this Court, justified the sort of limitation upon that authority which the Court of Appeals fashioned in this case.

III

Virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta. We would not therefore be foreclosed by principles of *stare decisis* from further examination into history and practice in order to see whether the sort of qualifications imposed by the Court of Appeals in this case were in fact intended by the Framers of the Fourth Amendment or recognised in cases decided prior to *Weeks*. Unfortunately such authorities as exist are sparse. Such common-law treatises as Blackstone's Commentaries and Holmes' Common Law are simply silent on the subject. Pollock and Maitland,

in their History of English Law, describe the law of arrest as "rough and rude" before the time of Edward the First, but do not address the authority to search incident to arrest. II Pollock and Maitland, at 582.

The issue was apparently litigated in the English courts in *Dillon* v. *O'Brien*, 16 Cox C. C. 245 (Exch. Ireland, 1887), cited in *Weeks* v. *United States*, *supra*, There Baron Palles said:

"But the interest of the state in the person charged being brought to trial in due course necessarily extends, as well to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty forum. But if there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture." 16 Cox C. C. 245, 250.

Spalding v. *Preston*, 21 Vt. 9 (1848), represents an early holding in this country that evidence may be seized from one who is lawfully arrested. In *Closson* v. *Morrison*, 47 N. H. 484 (1867), the Court made the following statement:

"We think that an officer would also be justified in taking from a person whom he has arrested for crime, any deadly weapon he might find upon him, such as a revolver, a dirk, a knife, a sword cane, a slung shot, or a club, though it had not been used or intended to be used in the commission of the offense for which the prisoner had been arrested, and even though no threats of violence towards the officer had been made. A due regard for his own safety on the part of the officer, and also for the public safety, would justify a sufficient search to

ascertain if such weapons were carried the person of the prisoner, or were in his possession, and if found, to seize and hold them until the prisoner should be discharged, or until they can otherwise be properly disposed of. *Spalding v. Preston*, 21 Vt. 9, 16.

"So we think it might be with money or other articles of value, found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools, or implements, or weapons with which to effect his escape. We think the officer arresting a man for crime, not only may, but frequently should, make such searches and seizures; then in many cases they might be reasonable and proper, and courts would hold him harmless for so doing, when he acts in good faith, and from a regard to his own or the public safety, or the security of his prisoner." 47 N. H., at 484-485.

Similarly in *Holker v. Hennessey*, 141 Mo. 527 (1897), the Supreme Court of Missouri says:

"Generally speaking, in the absence of a statute, an officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape." *Id.*, at 539.

Then Chief Judge Cardozo of the New York Court of Appeals summarized his understanding of the historical basis for the authority to search incident to arrest in these words:

"The basic principle is this: search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation [citation omitted]. Search of the person becomes

lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.

"The distinction may seem subtle, but in truth it is founded in shrewd appreciation of the necessities of government. We are not to strain an immunity to the point at which human nature rebels against honoring it in conduct. The peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime." *People* v. *Chiagles*, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923).

While these earlier authorities are sketchy, they tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case. The scarcity of case law before *Weeks* is doubtless due in part to the fact that the exclusionary rule there enunciated had been first adopted only 11 years earlier in Iowa; but it would seem to be also due in part to the fact that the issue was regarded as well-settled.[5]

The Court of Appeals in effect determined that the *only* reason supporting the authority for a *full* search

[5] See T. Taylor, Two Studies in Constitutional Interpretation 44-45 (1969).

Taylor suggests that there "is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." *Id.*, at 28. "Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century and . . . the English courts gave the point short shrift." *Id.*, at 29.

incident to lawful arrest was the possibility of discovery of evidence or fruits.[1] Concluding that there could be no evidence or fruits in this case of an offense such as that with which respondent was charged, it held that any protective search would have to be limited by the conditions laid down in *Terry* for a search upon less than probable cause to arrest. Quite apart from the fact that *Terry* clearly recognized the distinction between the two types of searches, and that a different rule governed one than governed the other, we find additional reason to disagree with the Court of Appeals.

The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial. *Agnello* v. *United States*, *supra*; *Abel* v. *United States*, 362 U. S. 217 (1960). The standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made.

Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their license has been revoked are less likely to be possessed of dangerous

[1] Where the arrest is made for a crime for which it is reasonable to believe that evidence exists, the Court of Appeals recognizes that "warrantless intrusion into the pockets of the arrestee to discover such evidence is reasonable under the 'search incident' exception." 471 F. 2d, at 1095. The court then states that the officer may use this "reasonable (evidentiary) intrusion" to simultaneously look for weapons. *Ibid.*

weapons than are those arrested for other crimes.[8] It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to *Weeks*, nor what we can glean from the history of practice in this country and in England, requires such a case by case adjudication. A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does

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[8] Such an assumption appears at least questionable in light of the available statistical data concerning assaults on police officers who are in the course of making arrests. The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty, and not from the grounds for arrest. One study concludes that approximately 30% of the shootings of police officers occur when the officer approaches a person seated in a car. Bristow, Police Officer Shootings—A Factual Evaluation, 54 J. Crim. L. C. & P. S. 93 (1963), cited in *Adams* v. *Williams*, 407 U. S. 143, 148 (1972). The Government in its brief notes that the Uniform Crime Reports, prepared by the Federal Bureau of Investigation, indicate that a significant percentage of police officers murders occur when the officers are making traffic stops. Brief for the United States, at 23. Those reports indicate that during January-March, 1973, 35 police officers were murdered; 11 of those officers were killed while engaged in traffic stops. *Ibid.*

not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

IV

The search of respondent's person conducted by Officer Jenks in this case and the seizure from him of the heroin, were permissible under established Fourth Amendment law. While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin* v. *California*, 342 U. S. 165 (1952). Since it is the fact of custodial arrest which gives rise to the authority to search,[6] it is of no moment that Jenks did not indicate any subjective fear of the

[6] The majority opinion of the Court of Appeals also discussed its understanding of the law where the police officer makes what the court characterised as "a routine traffic stop," *i. e.*, where the officer would simply issue a notice of violation and allow the offender to proceed. Since in this case the officer did make a full custody arrest of the violator, we do not reach the question discussed by the Court of Appeals.

respondent or that he did not himself suspect that respondent was armed.[1] Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct. *Harris* v. *United States*, *supra*, 331 U. S., at 154–155; *Warden* v. *Hayden*, 387 U. S. 294, 299, 307 (1967); *Adams* v. *Williams*, *supra*, 407 U. S., at 149. The judgment of the Court of Appeals holding otherwise is

Reversed.

[1] The United States concedes that "in searching respondent, [Officer Jenks] was not motivated by a feeling of imminent danger and was not specifically looking for weapons." Brief for the United States, at 34. Officer Jenks testified, "I just searched him [Robinson]. I didn't think about what I was looking for. I just searched him." Officer Jenks also testified that upon removing the cigarette package from the respondent's custody, he was still unsure what was in the package, but that he knew it was not cigarettes.

SUPREME COURT OF THE UNITED STATES

Nos. 72-936 AND 71-1669

United States, Petitioner, 72-936 v. Willie Robinson, Jr.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
James E. Gustafson, Petitioner, 71-1669 v. State of Florida.	On Writ of Certiorari to the Supreme Court of Florida.

[December 11, 1973]

MR. JUSTICE POWELL, concurring.

Although I join the opinions of the Court, I write briefly to emphasize what seems to me to be the essential premise of our decisions.

The Fourth Amendment safeguards the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." These are areas of an individual's life about which he entertains legitimate expectations of privacy. I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly

limited by the twin rationales of seizing evidence and disarming the arrestee.[1] The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.[2]

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[1] The Court of Appeals for the Ninth Circuit aptly stated this rationale in *Charles* v. *United States*, 278 F. 2d 386, 388–389 (1960):

"Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must, of necessity, be asserted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, unless they violate the dictates of reason either because of their number or their manner of perpetration." [Citations omitted.]

[2] In *Gustafson*, the petitioner conceded the validity of the custodial arrest, although that conclusion was not as self-evident as in *Robinson*. *Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives. But no such question is before us.

No. 72-936

United States, Petitioner, v. Willie Robinson, Jr. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December 11, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Certain fundamental principles have characterized this Court's Fourth Amendment jurisprudence over the years. Perhaps the most basic of these was expressed by Mr. Justice Butler, speaking for a unanimous Court in *Go-Bart Co. v. United States*, 282 U. S. 344 (1931): "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." 282 U. S., at 357. As we recently held, "The constitutional validity of a warrantless search is preeminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U. S. 40, 59 (1968). And the intensive, at times painstaking, case by case analysis characteristic of our Fourth Amendment decisions bespeaks our "jealous regard for maintaining the integrity of individual rights." *Mapp v. Ohio*, 367 U. S. 643, 647 (1961). See also *Weeks v. United States*, 232 U. S. 383, 393 (1914).

In the present case, however, the majority turns its back on these principles, holding that "the fact of the lawful arrest" always establishes the authority to conduct a full search of the arrestee's person, regardless of whether in a particular case "there was present one of the reasons supporting the authority for a search of the person inci-

dent to a lawful arrest." *Ante*, at ———. The majority's approach represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment. I continue to believe that "[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968). Because I find the majority's reasoning to be at odds with these fundamental principles, I must respectfully dissent.

I

On April 19, 1968, Officer Richard Jenks stopped a 1965 Cadillac driven by respondent at the intersection of Ninth and U Streets, N. W., in the District of Columbia, for what was called a "routine spot check." At that time, Officer Jenks examined respondent's temporary operator's permit, automobile registration card, and selective service classification card. Although he permitted respondent to go on his way, Officer Jenks pursued a discrepancy he had noted between the "1938" date of birth given on the operator's permit and the "1927" date of birth given on the selective service card. A check of police traffic records showed that an operator's permit issued to one Willie Robinson, Jr., born in 1927, had been revoked, and that a temporary operator's permit had subsequently been issued to one Willie Robinson, born in 1938. The pictures on the revoked permit and on the application for the temporary permit were of the same man—the person stopped by Jenks for the routine check on April 19th. Having investigated the matter himself in this fashion, it is clear that Officer Jenks had

probable cause to believe that respondent had violated a provision of the District of Columbia Motor Vehicle Code making it unlawful for any person to operate a motor vehicle in the District during the period for which his operator's permit is revoked. 40 D. C. Code § 302 (d).

Four days later, on April 23, 1968, while on duty in their patrol car, Officer Jenks and his partner saw respondent driving the same vehicle. They pulled up behind respondent's car and signalled it to stop. From all indications in the record, respondent immediately complied and brought his car to a stop alongside the curb, the officers parking their patrol car immediately behind his.

Respondent got out of his car and walked back towards the patrol car. Both Officer Jenks and his partner got out of the patrol car and started toward respondent's car. Officer Jenks asked respondent for his permit and registration card and, when shown the same permit respondent had given him four days earlier, informed respondent that he was under arrest for operating a motor vehicle after revocation of his operator's permit.

Jenks then began to search respondent. His normal procedure in conducting a search of an arrestee would be to "have him spread-eagle against a wall or something of that nature." But in Jenks' own words, "I think almost every search is different. It depends on the man's size and the nature of the crime." Since he had a substantial height and weight advantage over respondent, and because the arrest was only for a traffic offense, Jenks chose instead to conduct the search face-to-face, in contrast to his normal practice.

The first step in the search was for Jenks to place both his hands on respondent's chest and begin to pat him down. During this patdown, Jenks felt something in the left breast pocket of respondent's heavy overcoat. Jenks

later testified that he could not immediately tell what was in the pocket. The record does indicate, however, that the object did not feel like a gun and that Jenks had no particular indication it was a weapon of any kind.[1] Nonetheless, he reached into the pocket and took the object out. It turned out to be a crumpled up cigarette package.

With the package now in his hands, Jenks could feel objects inside but could not tell what they were. It does not appear that Jenks had any reason to believe, or did in fact believe, that the objects were weapons of any sort. He nevertheless opened up the package and looked inside, thereby finding the gelatin capsules of heroin which were introduced against respondent at his trial for the possession and facilitation of concealment of heroin.

II

Mr. Justice Jackson, writing for the Court in *Johnson v. United States*, 333 U. S. 10, 13–14 (1948), explained that:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protections consist in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must yield to the right of search is, as a rule, to be decided by

[1] At the suppression hearing, Officer Jenks was shown a small Derringer and was asked, after the gun was placed in a coat pocket, "Whether or not it feels like the lump you felt in Mr Robinson's pocket the night you arrested him?" Jenks answered that the object "does not feel the same" but rather felt "harder," "larger," and "much more suspicious."

a judicial officer, not by a policeman or government enforcement agent."

See also *Coolidge* v. *New Hampshire*, 302 U. S. 443, 449 (1971). The majority's fear of overruling the "quick ad hoc judgment" of the police officer is thus inconsistent with the very function of the Amendment—to ensure that the quick ad hoc judgments of police officers are subject to review and control by the judiciary.

In the vast majority of cases, the determination of when the right of privacy must reasonably yield to the right of search is required to be made by a neutral judicial officer before the search is conducted. See *Katz* v. *United States*, 389 U. S. 347, 356–357 (1968); *Agnello* v. *United States*, 269 U. S. 20, 33 (1925). The Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ." *Wong Sun* v. *United States*, 371 U. S. 471, 481–482 (1963).

The requirement that the police seek prior approval of a search from a judicial officer is, no doubt, subject to "a few specifically established and well-delineated exceptions," *Katz* v. *United States*, *supra*, 389 U. S., at 357, including searches of a moving vehicle, *Carroll* v. *United States*, 267 U. S. 132 (1925), searches in certain exigent circumstances, *Warden* v. *Hayden*, 387 U. S. 294, 298–299 (1967); *McDonald* v. *United States*, 335 U. S. 451, 454–455 (1948), and searches incident to a lawful arrest, *Agnello* v. *United States*, *supra*; *Chimel* v. *California*, 395 U. S. 752 (1969). But because an exception is invoked to justify a search without a warrant does not preclude further judicial inquiry into the reasonableness of that search. It is the role of the judiciary, not of police officers, to delimit the scope of exceptions to the warrant requirement. "[T]he general requirement that a search warrant be obtained is not lightly to be dispensed

with, and 'the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .'" *Chimel* v. *California*, *supra*, 395 U. S., at 762, quoting *United States* v. *Jeffers*, 342 U. S. 48, 51 (1951). Exceptions to the warrant requirement are not talismans precluding further judicial inquiry whenever they are invoked, see *Coolidge* v. *New Hampshire*, *supra*, 403 U. S., at 461, but rather are "jealously and carefully drawn." *Jones* v. *United States*, 357 U. S. 493, 499 (1958).

Carrying out our mandate of delineating the proper scope of the search incident to arrest exception requires consideration of the purposes of that exception as they apply to the particular search that occurred in this case. See *Chimel* v. *California*, *supra*, 395 U. S., at 762–763; *Preston* v. *United States*, 376 U. S. 364, 367 (1964). Yet the majority, rather than focussing on the facts of this case, places great emphasis on the Police Department order which instructed Officer Jenks to conduct a full search and to examine carefully everything he found whenever making an in-custody arrest. See *ante*, at —— and n. 2. But this mode of analysis was explicitly rejected in *Sibron* v. *New York*, *supra*. There both the defendant and the State urged that the principal issue before us was the constitutionality of a state statute which authorized the search there in question. We declined, however, to engage in what we viewed "as the abstract and unproductive exercise" of laying the words of the statute next to the Fourth Amendment "in an effort to determine whether the two are in some sense compatible." 392 U. S., at 59. "Our Constitutional inquiry," we concluded, "would not be furthered here by an attempt to pronounce judgment on the words of the statute. We must confine our review instead to the reasonableness of the search and seizures which underlie these two convictions." *Id.*, at 62.

The majority also suggests that the Court of Appeals reached a novel and unprecedented result by imposing qualifications on the historically recognized authority to conduct a full search incident to a lawful arrest. Nothing could be further from the truth, as the Court of Appeals itself was so careful to point out.

One need not go back to Blackstone's Commentaries, Holmes' Common Law, or Pollock and Maitland in search of precedent for the approach adopted by the Court of Appeals. Indeed, given that mass production of the automobile did not begin until the early decades of the present century, I find it somewhat puzzling that the majority even looks to these sources for guidance on the only question presented in this case: the permissible scope of a search of the person incident to a lawful arrest for violation of a motor vehicle regulation. The fact is that this question has been considered by several state and federal courts, the vast majority of which have held that absent special circumstances a police officer has no right to conduct a full search of the person incident to a lawful arrest for violation of a motor vehicle regulation.

In *Barnes* v. *State*, 25 Wis. 2d 116, 130 N. W. 2d 264 (1964), for example, police officers stopped a car for a brake light violation. Rather than simply issue a citation, the officers placed the driver under arrest. A full search of the driver's person was then conducted, including shining a flashlight into his overcoat pocket, disclosing a small quantity of marihuana and a package of cigarette papers. The Supreme Court of Wisconsin held the search of the driver's pocket unreasonable. While expressly holding that where a traffic offender is actually arrested, as distinguished from being given a summons, it is reasonable for the arresting officer to search his person for weapons, nevertheless the court held it unreason-

able to look inside the driver's overcoat pocket with a flashlight. "We cannot conceive," the court said, "that this aspect of the search was a legitimate search for weapons. . . . We reject the state's contention that any search of the person of one lawfully arrested is a valid search." 25 Wis. 2d, at 126, 130 N. W. 2d, at 269.

In *State* v. *Curtis*, 290 Minn. 429, 190 N. W. 2d 631 (1971), police officers stopped a car which had defective taillights and which had made an illegal right turn. The officers decided to take the driver down to the station house and searched him for weapons before putting him in the squad car. One of the officers felt the outside of the driver's pockets. As in Robinson's case, the officer "detected some object but couldn't tell what it was. It did not feel like a gun or knife." 290 Minn., at 430, 190 N. W. 2d, at 632. "Neither officer expressed any concern for his personal safety. There was no testimony that they suspected defendant of any other criminal activity or were aware of any dangerous propensities on his part." Nevertheless the officer reached into the pocket, resulting in the discovery of a package of marihuana. The Minnesota Supreme Court held the search unlawful. While recognizing "the concern for the injuries and loss of life experienced by police officers in face-to-face confrontations with traffic offenders," the court held that "the validity of a search for weapons following a traffic arrest depends on whether the officer had reasonable grounds to believe such a search was necessary for his own safety or to prevent an escape." 290 Minn., at 437, 190 N. W. 2d, at 636, quoting *Shelton* v. *State*, 3 Md. App. 394, 399, 239 A. 2d 610, 613 (1968).

Of like import is the decision of the Oregon Supreme Court in *State* v. *O'Neal*, 251 Ore. 163, 444 P. 2d 951 (1968) (*en banc*). Here defendant's automobile was stopped because it had no rear license plate. When asked to produce an operator's license, the defendant

produced a temporary operator's license issued to another person which had expired several years earlier. The officers then arrested defendant and placed him in the back seat of the police car. "One of the officers got in the police car and asked the defendant to remove his money from his wallet and give his wallet to the officer. The defendant did so and the officer took papers from the wallet and examined them. When the officer unfolded one piece of paper a half-smoked marihuana cigarette fell out." 251 Ore., at 164–165, 444 P. 2d, at 952. The court held the search unlawful. Again, while recognizing the officer's right to conduct a search incident to arrest in order to protect the officer and deprive the prisoner of potential means of escape, the court held:

> "The search of the wallet obviously had nothing to do with the officer's safety. The defendant testified that the officers 'patted him down' before placing him in the police car. The officers did not remember whether they had or not. In any event, it is difficult to see how defendant's wallet could have reasonably been believed to have contained a weapon." 251 Ore., at 166, 444 P. 2d, at 953.

See also *People* v. *Marsh*, 20 N. Y. 2d 98, 281 N. Y. S. 2d 789, 228 N. E. 2d 783 (1967); *People* v. *Superior Court of Los Angeles County*, — Cal. 3d —, 101 Cal. Rptr. 837, 496 P. 2d 1205 (1972); *State* v. *Quintana*, 92 Ariz. 267, 376 P. 2d 130 (1962) (*en banc*); *People* v. *Zeigler*, 358 Mich. 355, 100 N. W. 2d 456 (1960). The Tenth Circuit has likewise stated that it is "in complete agreement with the prevailing federal and state authority which condemns the search of persons and automobiles following routine traffic violations." *United States* v. *Humphrey*, 409 F. 2d 1055, 1056 (CA10 1969). See also *Almador-Gonzalez* v. *United States*, 391 F. 2d 308, 315 (CA5 1968) (Wisdom, J.).

Accordingly, I think it disingenuous for the Court to now pronounce that what precedents exist on the question "tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case."[2] *Ante*, at —. It is disquieting, to say the least, to see the Court at once admit that "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta" and concede that we are presented with an open question on which "further examination into history and practice" would be helpful, yet then conduct an examination into prior practice which is not only wholly superficial, but totally inaccurate and misleading.

The majority's attempt to avoid case-by-case adjudication of Fourth Amendment issues is not only misguided as a matter of principle, but is also doomed to fail as a

[2] Even the Court's attempt to dip into the English common law is selective. The power to conduct a search incident to arrest was litigated in *Leigh* v. *Cole*, 6 Cox. C. C. 329 (Oxford Circuit 1863), a civil case in which the plaintiff, a lawyer, was stopped while on the road and arrested by defendant superintendent of police. After the plaintiff was taken to the station house, a police constable searched him, at the defendant's direction, and a tobacco box and a piece of paper were taken from him. In instructing the jury, the learned Judge stated: "With respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that a general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend upon all the circumstances of the case." *Id.*, at 332.

matter of practical application. As the majority itself is well aware, see *ante*, at —— n. 1, the powers granted the police in this case are strong ones, subject to potential abuse. Although, in this particular case, Officer Jenks was required by Police Department regulation to make an in-custody arrest rather than to issue a citation, in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer. There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search. See, *e. g.*, *Almador-Gonzalez* v. *United States*, 391 F. 2d 308 (CA5 1968). I suggest this possibility not to impugn the integrity of our police, but merely to point out that case-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee. Cf. *Gustafson* v. *State of Florida*, *post*, at —— (STEWART, J., concurring). "An arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz*, 385 U. S. 452, 467 (1932). See also *Jones* v. *United States*, *supra*, 357 U. S., at 500; *Abel* v. *United States*, *supra*, 362 U. S., at 226 and 230; *United States* v. *Rabinowitz*, 339 U. S. 56, 82 (1950) (Frankfurter, J., dissenting). Cf. *Chimel* v. *California*, *supra*, 395 U. S., at 767–768.

III

The majority states that "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." [3] *Ante*, at ——. No

[3] The majority's reference to the quick ad hoc judgment of the police officer may be read as an expression of doubt whether this

precedent is cited for this broad assertion—not surprisingly, since there is none. Indeed, we only recently rejected such "a rigid all-or-nothing model of justification and regulation under the Amendment, [for] it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry* v. *Ohio*, *supra*, 392 U. S., at 17–18. As we there concluded, "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, at 19–20.

As I view the matter, the search in this case divides into three distinct phases: the patdown of respondent's coat pocket; the removal of the unknown object from the pocket; and the opening of the crumpled up cigarette package.

A

No question is raised here concerning the lawfulness of the patdown of respondent's coat pocket. The Court

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kind of on the street police activity can effectively be controlled by court-imposed standards. This problem was discussed in *Terry* where we recognized "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." 392 U. S., at 12. But as we concluded there, even though "[n]o judicial opinion can comprehend the protean variety of the street encounter, . . . courts still retain their traditional responsibility to guard against police conduct . . . which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." 392 U. S., at 15.

of Appeals unanimously affirmed the right of a police officer to conduct a limited frisk for weapons when making an in-custody arrest, regardless of the nature of the crime for which the arrest was made. As it said,

> "it would seem clearly unreasonable to expect a police officer to place a suspect in his squad car for transportation to the station house without first taking reasonable measures to insure that the suspect is unarmed. We therefore conclude that whenever a police officer, acting within the bounds of his authority, makes an in-custody arrest, he may also conduct a limited *frisk* of the suspect's outer clothing in order to remove any weapons the suspect may have in his possession." — U. S. App. D. C. —, —, 471 F. 2d 1082, 1098 (1972) (emphasis in original).

B

With respect to the removal of the unknown object from the coat pocket, the first issue presented is whether that aspect of the search can be sustained as part of the limited frisk for weapons. The weapons search approved by the Court of Appeals was modeled upon the narrowly drawn protective search for weapons authorized in *Terry*, which consists "of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." See *Sibron* v. *New York*, *supra*, 392 U. S., at 65. See also *Terry*, *supra*, 391 U. S., at 30.

It appears to have been conceded by the Government below that the removal of the object from respondent's coat pocket exceeded the scope of a *Terry* frisk for weapons, since under *Terry*, an officer may not remove an object from the suspect's pockets unless he has reason to believe it to be a dangerous weapon. — U. S. App. D. C. —, 471 F. 2d, at 1089 and n. 9, citing American

Law Institute, Model Code of Pre-Arraignment Procedure § 110.2 (4) (Proposed Official Draft No. 1, 1972). Cf. *Sibron* v. *New York*, *supra*, 392 U. S., at 65.[4]

In the present case, however, Officer Jenks had no reason to believe and did not in fact believe that the object in respondent's coat pocket was a weapon. He admitted later that the object did not feel like a gun. See n. 1, *supra*. In fact, he did not really have any thoughts one way or another about what was in the pocket. As Jenks himself testified, "I just searched him. I didn't think about what I was looking for. I just searched him." Since the removal of the object from the pocket cannot be justified as part of a limited *Terry* weapons frisk, the question arises whether it is reasonable for a police officer, when effecting an in-custody arrest of a traffic offender, to make a fuller search of the person than is permitted pursuant to *Terry*.

The underlying rationale of a search incident to arrest of a traffic offender initially suggests as reasonable a search whose scope is similar to the protective weapons frisk permitted in *Terry*. A search incident to arrest, as the majority indicates, has two basic functions: the removal of weapons the arrestee might use to resist arrest or effect an escape, and the seizure of evidence or fruits of the crime for which the arrest is made, so as to prevent its concealment or destruction. See *ante*, at —; *Chimel* v. *California*, *supra*, 395 U. S., at 763.

The Government does not now contend that the search of respondent's pocket can be justified by any need to find and seize evidence in order to prevent its conceal-

[4] This was also the position of the Police Department itself. Sergeant Donaldson, a Police Department Training Division Instructor, testified "If [the officer] could determine in his pat-down or frisk by squeezing that it was not, in fact, a weapon that could be used against him, then we don't instruct him to go further."

ment or destruction, for as the Court of Appeals found, there are no evidence or fruits of the offense with which respondent was charged. The only rationale for a search in this case, then, is the removal of weapons which the arrestee might use to harm the officer and attempt an escape. This rationale, of course, is identical to the rationale of the search permitted in *Terry*. As we said there, "The sole justification of the search in the present situation is the protection of the police officers and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry* v. *Ohio*, *supra*, 392 U. S., at 29. Since the underlying rationale of a *Terry* search and the search of a traffic violator are identical, the Court of Appeals held that the scope of the searches must be the same. And in view of its conclusion that the removal of the object from respondent's coat pocket exceeded the scope of a lawful *Terry* frisk, a conclusion not disputed by the Government nor challenged by the majority here, the plurality of the Court of Appeals held that the removal of the package exceeded the scope of a lawful search incident to arrest of a traffic violator.

The problem with this approach, however, is that it ignores several significant differences between the context in which a search incident to arrest for a traffic violation is made, and the situation presented in *Terry*. Some of these differences would appear to suggest permitting a more thorough search in this case than was permitted in *Terry*; other differences suggest a narrower, more limited right to search than was there recognized.

The most obvious difference between the two contexts relates to whether the officer has cause to believe that the individual he is dealing with possesses weapons which might be used against him. *Terry* did not permit an officer to conduct a weapons frisk of anyone he lawfully

stopped on the street, but rather, only where "he has reason to believe that he is dealing with an armed and dangerous individual . . . ." 392 U. S., at 27. While the policeman who arrests a suspected rapist or robber may well have reason to believe he is dealing with an armed and dangerous person, certainly this does not hold true with equal force with respect to persons arrested for motor vehicle violations of the sort involved in this case.

Nor was there any particular reason in this case to believe that respondent was dangerous. He had not attempted to evade arrest, but had quickly complied with the police both in bringing his car to a stop after being signalled to do so and in producing the documents Officer Jenks requested. In fact, Jenks admitted that he searched respondent face-to-face rather than in spread-eagle fashion because he had no reason to believe respondent would be violent.

While this difference between the situation presented in *Terry* and the context presented in this case would tend to suggest a lesser authority to search here than was permitted in *Terry*, other distinctions between the two contexts suggest just the opposite. As the Court of Appeals noted, a crucial feature distinguishing the in-custody arrest from the *Terry* context "is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed." — U. S. App. D. C., at —, 471 F. 2d, at 1098, quoting *People* v. *Superior Court of Los Angeles County*, *supra*, 101 Cal. Rptr., at 857, 496 P. 2d, at 1225 (Wright, C. J., concurring) (emphasis in original). A *Terry* stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in close proximity for a much longer period of time. If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer

in the in-custody situation. The prolonged proximity also makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force.

Thus, in some senses there is less need for a weapons search in the in-custody traffic arrest situation than in a *Terry* context; while in other ways, there is a greater need. Balancing these competing considerations in order to determine what is a reasonable warrantless search in the traffic arrest context is a difficult process, one for which there may be no easy analytical guideposts. We are dealing in factors not easily quantified and, therefore, not easily weighed one against the other. And the competing interests we are protecting—the individual's interest in remaining free from unnecessarily intrusive invasions of privacy and society's interest that police officers not take unnecessary risks in the performance of their duties—are each deserving of our most serious attention and do not themselves tip the balance in any particular direction.

As will be explained more fully below, I do not think it necessary to solve this balancing equation in this particular case. It is important to note, however, in view of the reasoning adopted by the majority, that available empirical evidence supports the result reached by the plurality of the Court of Appeals, rather than the result reached by the Court today.

The majority relies on statistics indicating that a significant percentage of police officer murders occur when the officers are making traffic stops. But these statistics only confirm what we recognized in *Terry*—that "Ameri-

can criminals have a long traditoin of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Terry* v. *Ohio*, *supra*, 392 U. S., at 23. As the very next sentence in *Terry* recognized, however, "Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives." *Id.*, at 24. The statistics relied on by the Government in this case support this observation. Virtually all of the killings are caused by guns and knives, the very type of weapons which will not go undetected in a properly conducted weapons frisk.[6] It requires more than citation to these statistics, then, to support the proposition that it is reasonable for police officers to conduct more than a *Terry*-type frisk for weapons when seeking to disarm a traffic offender who is taken into custody.

C

The majority opinion fails to recognize that the search conducted by Officer Jenks did not merely involve a search of respondent's person. It also included a separate search of effects found on his person. And even were we to assume, *arguendo*, that it was reasonable for Jenks to remove the object he felt in respondent's pocket, clearly there was no justification consistent with the Fourth Amendment which would authorize his opening the package and looking inside.

To begin with, after Jenks had the cigarette package in his hands, there is no indication that he had reason to believe or did in fact believe that the package con-

[6] The Uniform Crime Reports prepared by the Federal Bureau of Investigation which are relied on by the majority, see *ante*, at — n. 5, indicate that 112 police officers were killed nationwide in 1972. Of these, 108 were killed by firearms. Two of the remaining four were killed with knives, and the last two cases involved a bomb and an automobile.

tained a weapon. More importantly, even if the crumpled up cigarette package had in fact contained some sort of small weapon, it would have been impossible for respondent to have used it once the package was in the officer's hands. Opening the package therefore did not further the protective purpose of the search. Even the dissenting judges on the Court of Appeals were forced to concede that "since the package was now in the officer's possession any risk of the prisoner's use of a weapon in the package had been eliminated."[6] — U. S. App. D. C., at —, 471 F. 2d, at 1118 (Wilkey, J., dissenting).

It is suggested, however, that since the custodial arrest itself represents a significant intrusion into the privacy of the person, any additional intrusion by way of opening or examining effects found on the person is not worthy of constitutional protection. But such an approach was expressly rejected by the Court in *Chimel*. There it was suggested that since the police had lawfully entered petitioner's house to effect an arrest, the additional invasion of privacy stemming from an accompanying search of the entire house was inconsequential. The Court answered: "[W]e see no reason why, simply because some interference with an individual's privacy

[6] The dissenting judges argued, however, that "further inspection of the package was still justifiable as a protective measure. If the package had contained a razor blade, or live bullets, the officer would have been alerted to search Robinson much more thoroughly since the possibility of there being other weapons concealed on his person would increase." — U. S. App. D. C., at —, 471 F. 2d, at 1118. But as Judge Bazelon indicated in his opinion below, this kind of reasoning would render meaningless scope limitations on searches. Were one to accept this logic, for example, it would have been reasonable for the police to search the entire house in *Chimel*, *supra*, for if a weapon had been found somewhere in the house, the arresting officer would have been alerted to search Chimel himself more thoroughly, as the possibility of there being other weapons concealed on his person would arguably have increased.

and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." 395 U. S., at 766 n. 12.

The Fourth Amendment preserves the right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." *Chimel* established the principle that the lawful right of the police to interfere with the security of the person did not, standing alone, automatically confer the right to interfere with the security and privacy of his house. Hence, the mere fact of an arrest should be no justification, in and of itself, for invading the privacy of the individual's personal effects.

The Government argues that it is difficult to see what constitutionally protected "expectation of privacy" a prisoner has in the interior of a cigarette pack. One wonders if the result in this case would have been the same were respondent a businessman who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police. Would it be reasonable for the police officer, because of the possibility that a razor blade was hidden somewhere in the wallet, to open it, remove all the contents, and examine each item carefully? Or suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade? Cf. *Harris* v. *United States*, 331 U. S. 145 (1947); *Chimel* v. *California*, *supra*, 395 U. S., at 758. Would it not be more consonant with the purpose of the Fourth Amendment and the legitimate needs of the police to require the officer, if he has any question whatsoever about what the wallet or letter con-

tains, to hold onto it until the arrestee is brought to the precinct station?[7]

I, for one, cannot characterize any of these intrusions into the privacy of an individual's papers and effects as

[7] Nor would it necessarily have been reasonable for the police to have opened the cigarette package at the police station. The Government argued below, as an alternative theory to justify the search in this case, that when a suspect is booked and is about to be placed in station house detention, it is reasonable to search his person to prevent the introduction of weapons or contraband into the jail facility and to inventory the personal effects found on the suspect. Since respondent's cigarette package would have been removed and opened at the station house anyway, the argument goes, the search might just as well take place in the field at the time of the arrest. This argument fails for two reasons. First, as the Court of Appeals had indicated in its opinion in *United States* v. *Mills*, 153 U. S. App. D. C. —, 472 F. 2d 1231 (1972) (*en banc*), the justification for station house searches is not the booking process itself, but rather the fact that the suspect will be placed in jail. In the District of Columbia, petty offenses of the sort involved in the present case are bailable, and, as the Government stipulated in *Mills*, the normal procedure is for offenders to be advised of the opportunity to post collateral at the station house and to avoid an inventory search unless they are unable or refuse to do so. 153 U. S. App. D. C., at ———, 472 F. 2d, at 1235–1236. One cannot justify a full search in the field on a subsequent event that quite possibly may never take place.

Second, even had it become necessary to place respondent in confinement, it is still doubtful whether one could justify opening up the cigarette package and examining its contents. The purposes of preventing the introduction of weapons or contraband into the jail facility are fully served simply by removing the package from the prisoner. It is argued that the police must inventory effects found on the prisoner in order to avoid a later claim by the prisoner that jail personnel stole his property. But as the Court of Appeals noted in *Mills*, the police can protect themselves against such claims by means involving a less extreme intrusion on privacy than would be entailed in opening up and examining the contents of all effects found on the person. As an example, the Court of Appeals suggested that the prisoner be given "an oppor-

being negligible incidents to the more serious intrusion into the individual's privacy stemming from the arrest itself. Nor can any principled distinction be drawn between the hypothetical searches I have posed and the search of the cigarette package in this case. The only reasoned distinction is between warrantless searches which serve legitimate protective and evidentiary functions and those that do not. See *Chimel, supra,* 395 U. S., at 766.

The search conducted by Officer Jenks in this case went far beyond what was reasonably necessary to protect him from harm or to ensure that respondent would not effect an escape from custody. In my view, it therefore fell outside the scope of a properly drawn "search incident to arrest" exception to the Fourth Amendment's warrant requirement. I would affirm the judgment of the Court of Appeals holding that the fruits of the search should have been suppressed at respondent's trial.

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tunity, like that accorded someone given a bathhouse locker for temporary use, to 'check' his belongings in a sealed envelope, perhaps upon executing a waiver releasing the officer of any responsibility." 153 U. S. App. D. C., at —, 472 F. 2d, at 1239 n. 11.

The Government also suggested in oral argument before this Court that it would be administratively inconvenient to require a police officer, after removing an object from an arrestee, to hold onto the object rather than to look inside and determine what it contains. Mere administrative inconvenience, however, cannot justify invasion of Fourth Amendment rights. See *Chimel, supra,* 392 U. S., at 768 n. 16. One can no doubt imagine cases where the inconvenience might be so substantial as to interfere with the task of transporting the suspect into custody. While these situations might necessitate a different rule, certainly in this case there would have been no inconvenience whatsoever. Officer Jenks could easily have placed the cigarette package in his own pocket or handed it to his partner to hold onto until they reached the precinct station.